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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-494

TEXTRON, INC., BELL HELICOPTER TEXTRON,
a division of Textron, Inc.,

Petitioner,

v.

THE UNITED STATES OF AMERICA

and

THE VIRGINIA NATIONAL GUARD AND ITS ADJUTANT GENERAL, THE COMMONWEALTH OF VIRGINIA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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TABLE OF CONTENTS

	Page
Table of Citations	ii
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions, Statutes, and Regulations Involved	3
Statement of the Case and Proceedings in the Courts Below	3
Reasons for Granting the Writ	7
1. The respondent United States should not be permitted to take advantage of the potential inconsistencies arising out of the doctrines espoused by the Court in the *Maryland* and *Stencel* decisions	9
2. The respondent Commonwealth cannot be permitted to benefit from the inherently contradictory positions asserted in the case at bar as to the status of members of the Virginia Army National Guard in order to avoid the decisions of this Court as to waiver of sovereign immunity by a state	16
3. The decisions of the Court of Appeals below is inequitable and in conflict with decisions of other circuits in that it requires an aircraft manufacturer to bear the entire liability under the circumstances of this case wherein a third-party manufacturer with, at most, passive liability, should be entitled to relief under a federal rule of indemnity and contribution	21
Conclusion	30
Appendix	
Opinions and Judgments Below	1a
Constitutional Provisions	44a
Statutes	46a
Regulations	52a
Cases	59a
Miscellaneous	102a

TABLE OF CITATIONS

Page

CASES

Air Transport Associates Inc. v. *United States*, 221 F.2d 467 (9th Cir. 1955) 19

Brkaric v. *Star Iron & Steel Co.*, 409 F.Supp. 516 (E.D.N.Y. 1976) 29

Brooks v. *United States*, 337 U.S. 49 (1949) 12

Chesapeake Bay Bridge and Tunnel District v. *Lauritzen*, 404 F.2d 1001 (4th Cir. 1968) 20

Croshaw v. *Koninklijke Nedlloyd, B. V. Rijswijk*, 398 F.Supp. 1224 (D.Or. 1975) 29

Dawkins v. *Craig*, 483 F.2d 1191 (4th Cir. 1973), *cert. denied*, 415 U.S. 938 (1974) 20

Dawson v. *Contractors Transport Corp.*, 467 F.2d 727 (D.C.Cir. 1972) 29

Dole v. *Dow Chemical Co.*, 30 N.Y.2d 143, 331 N.Y.S.2d 382, 282 N.E.2d 288 (1972) 25

Eastern Air Lines Inc. v. *Union Trust Co.*, 221 F.2d 62 (D.C.Cir.), *aff'd, sub-nom United States* v. *Union Trust Co.*, 350 U.S. 907 (1955) 19

Employees of the Dept. Of Public Health and Welfare of Missouri v. *Dept of Public Health and Welfare of Missouri*, 411 U.S. 279 (1973). 17,20

Feres v. *United States*, 340 U.S. 135 (1950) 6,7,8, 9,12,13, 16

Humphries v. *Tann*, 13 Aviation Cases 18,229 (E.D.Mich. 1976) 21

Illinois v. *City of Milwaukee*, 406 U.S. 91 (1972) 22

In re Paris Air Crash, 399 F.Supp. 732 (C.D.Cal. 1975) 21

Page

Kohr v. *Allegheny Airlines Inc.*, 504 F.2d 400 (7th Cir. 1974), *cert. denied sub. nom., Forth Corp.* v. *Allegheny Airlines Inc.*, 421 U.S. 978 (1975) 19,21,22, 23,24,26, 27,28,29

Marant v. *Farrell Lines, Inc.*, 550 F.2d 142 (3rd Cir. 1977) 28

Maryland for the Use of Levin v. *United States*, 381 U.S. 41, *judgment vacated in order to direct remand for further proceedings on unresolved issues*, 382 U.S. 159 (1965) 2,7,8, 9,10,11, 12,14,15

Murray v. *United States*, 405 F.2d 1361 (D.C.Cir. 1968) 28

Parden v. *Terminal Railway Co. of the Alabama State Docks Dept.*, 377 U.S. 184 (1964) 17,20

Stencel Aero Engineering Corporation v. *United States*, 431 U.S. 666 (1977) 2,7,8, 9,12,13, 14,15,16, 17,28,29

United Air Lines Inc. v. *Wiener*, 335 F.2d 379 (9th Cir.), *cert. dismissed sub-nom, United Air Lines Inc.* v. *United States*, 379 U.S. 951 (1964) 19

United States v. *Hunsucker*, 314 F.2d 98 (9th Cir. 1962) 19

United States v. *Reliable Transfer Co. Inc.*, 421 U.S. 397 (1975) 22

UNITED STATES CONSTITUTION

Article I, Section 8 ..... 3,11,15, 17

	Page
Article II, Section 2	3,16
Amendment 11	3,8
STATUTES	
10 U.S.C. §§ 3077-3079	3,13
28 U.S.C. §§:	
1254(1)	2
1331	4
1332	4
1346	3,7
2101(c)	2
2674	3
2680	3,9,19
32 U.S.C. §§:	
109	3
709	3
49 U.S.C. §§ 1301 *et seq*	19
Virginia Code § 44-40.1	3,16
REGULATIONS	
32 Code of Federal Regulations §§:	
7-203.22	3,26
7-204.21	3,26
10-404	3,26
564.52(b)	3,13
MISCELLANEOUS	
Interagency Task Force on Product Liability: Legal Study, Report No. ITFPL-77/02, National Technical Information Service (1978)	25

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, Textron, Inc., and its division, Bell Helicopter Textron (hereinafter "Bell Textron"), respectfully prays that a writ of certiorari issue to review the judgments and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on June 29, 1978, which affirmed the orders of the court below dismissing the third-party complaints filed by petitioner against respondents The Commonwealth of Virginia and the Virginia Army National Guard (hereinafter collectively the "respondent Commonwealth") and the United States of America (hereinafter the "respondent United States").[1]

OPINIONS BELOW

The opinion of the United States Court of Appeals is not yet reported, officially or unofficially. It is printed in the Appendix to this Petition at pages 1a-6a. The judgments entered by the Court of Appeals are printed in the Appendix to this Petition at pages 7a-10a. Additionally, a copy of the Joint Appendix and a copy of all briefs filed in the Court of Appeals are being filed as Exhibits to this Petition.

There were no opinions, as such, rendered by the United States District Court for the Eastern District of Virginia, Alexandria Division; the transcripts of the motion proceedings and orders of dismissal rendered by the District Court are printed in the Appendix to this Petition at pages 11a-43a.

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[1] Nadia B. Henry, Administratrix of the Estate of James Howard Henry, and Elmer W. Ramsey, Administrator of the Estate of Philip R. Ramsey are no longer parties to this case, see p.7n.3 *infra*.

JURISDICTION

The judgments of the United States Court of Appeals for the Fourth Circuit were entered on June 29, 1978. This Petition is timely filed within ninety days of that date pursuant to 28 U.S.C. §2101(c). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Can the doctrine of governmental immunity announced by this Court in *Stencel Aero Engineering Corporation* v. *United States,* 431 U.S. 666 (1977), be applied to deny a third party claim in an action arising out of the deaths of two inactive duty drill status National Guardsmen in view of the decision of this Court in *Maryland for the Use of Levin* v. *United States,* 381 U.S. 41, *judgment vacated in order to direct remand for further proceedings on unresolved issues,* 382 U.S. 159 (1965), wherein the status of National Guardsmen was held to be "nonfederal" (as a ground for exculpating the United States from liability for their actions).

2. Under circumstances where the respondent Commonwealth has performed a traditionally proprietary function in taking custody of, training maintenance personnel for, and maintaining a helicopter owned by the United States in accordance with federal standards, has the respondent Commonwealth entered a federal sphere of activity which waives its sovereign immunity from suit in tort.

3. Should petitioner, Bell Textron, an aircraft manufacturer, be held solely liable to respond to claims of damages for deaths resulting from the crash of an aircraft, manufactured ten years previously, and which had been significantly modified during the ten years subsequent to its manufacture, under circumstances where a federal rule of equitable contribution would provide relief from the

third-party defendants, who were found to be more culpable than the petitioner?

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The provisions of the United States Constitution which are involved are Article I, Section 8; Article II, Section 2; and Amendment 11. These provisions are printed in the Appendix to this Petition at pages 44a-46a.

The statutes involved are 10 U.S.C. §§ 3077-3079; 28 U.S.C. §§ 1346(b), 2674, and 2680; 32 U.S.C. §§ 109 and 709; and Code of Virginia § 44-40.1. These provisions are printed in the Appendix to this Petition at pages 46a-52a.

The regulations involved are 32 C.F.R. §§ 7-203.22, 7-204.21, 10-404 and 564.52(b). These provisions are printed in the Appendix to this Petition at pages 52a-58a.

STATEMENT OF THE CASE AND PROCEEDINGS IN THE COURTS BELOW

Petitioner contends that the United States Court of Appeals for the Fourth Circuit has rendered an opinion which subjects it to the inequitable burden of bearing sole financial responsibility for the deaths of two individuals when that burden should equitably be borne either solely by the respondent Commonwealth or, solely by the respondent United States, or, in the alternative, shared by both respondents and petitioner. In rendering its opinion, the United States Court of Appeals for the Fourth Circuit noted that, with the apparent state of the law, petitioner was "placed in a very difficult position by the expanding doctrines of products liability and the relatively inflexible doctrines of sovereign immunity and Eleventh Amendment immunity. . . " (Appendix p. 5a). It is that dichotomy from which this petition seeks relief.

These two actions were originally commencced by the estates of James Henry and Philip Ramsey against petitioner Bell Textron on Decembr 22, 1976, seeking damages for the death of both decedents in an accident on January 23, 1976, involving a United States Army helicopter assigned to the Virginia Army National Guard. Jurisdiction was founded on 28 U.S.C. § 1332. Decedents Henry and Ramsey were the pilots of said helicopter and were performing inactive drill status duty for training as members of the Virginia Army National Guard at the time of the accident under the operational control of the Virginia Army National Guard Aviation Support Facility, Sandston, Virginia. Each of the complaints alleged that Bell Textron negligently designed and manufactured the aircraft, breached express and implied warranties, and was responsible to plaintiffs on a theory of strict liability.

Petitioner Bell Textron filed answers to the complaints denying these allegations and thereafter served and filed third-party complaints pursuant to Rule 14 of the Federal Rules of Civil Procedure seeking indemnity and/or contribution for any recovery by plaintiffs from the respondent Commonwealth and the respondent United States. Jurisdiction was founded on 28 U.S.C. § 1331.

The Aircraft Accident Report prepared by the Department of the Army and testimony developed during the course of pretrial discovery (including the deposition testimony of Colonel James S. Phlegar, commanding officer of the Virginia National Guard facility at Sandston and chairman of the Accident Investigation Board) disclosed the following facts indicating that the respondents "were more responsible for the crash than Bell Textron. . . " the petitioner herein (see the Opinion of the Court of Appeals, Appendix p. 5a).

The aircraft involved in the accident, a UH-1H helicopter, Serial No. 66-16293, was manufactured by Bell Textron in 1966, sold to the Army the same year, and was

owned at the time of the accident by the United States of America and its Department of the Army. While the United States retained ownership and responsibility for periodic overhaul of the helicopter aircraft, daily and periodic maintenance and visual inspections were the responsibility of the Virginia Army National Guard, and the aircraft was in fact "loaned" to the National Guard.

It was also established that the aircraft was approximately ten years old at the time of the accident; had served two combat tours of duty in Vietnam; had been overhauled on two occasions, and had been modified by normal maintenance to the extent that virtually every relevant part in the aircraft had been replaced at least twice since manufacture. The evidence also suggested that the aircraft had incurred battle damage in Vietnam on at least one occasion. The Aircraft Accident Report concluded that the accident was caused by the failure of a flexible coupling in the number one hanger assembly due to lack of lubrication and the subsequent loss of tail rotor thrust on the aircraft. Testimony also indicated that a contributory cause may have been misdiagnosis of the problem by the pilots.

Therefore, alleging the conclusion of the Accident Investigation Board to have been correct, petitioner Bell Textron, sought contribution and/or indemnity from either the respondent United States, which conducted the last complete overhaul of the aircraft at its Corpus Christi Army Depot, and which prescribed the maintenance and training procedures followed by the Virginia Army National Guard and/or from the respondent Commonwealth which had the responsibility for the routine maintenance and servicing of the aircraft and the training of its maintenance personnel. The inadequate lubrication had to have occurred during either overhaul or maintenance. Consequently, it was alleged that intervening and superseding actions or omissions to act by one or more of the

respondents proximately caused the accident and, therefore, petitioner Bell Textron was entitled to an equitable apportionment of liability and indemnity from those pa ties. In the present status of the case, these allegations should be accepted as true.

By motion dated February 23, 1977, the respondent Commonwealth moved the District Court to dismiss the third-party complaints against them in both the *Henry* and *Ramsey* cases upon the grounds that the Commonwealth was immune from suit in a federal court and both decedents were employed by the Virginia Army National Guard at the time of the accident. Petitioner Bell Textron opposed this motion upon the ground that under the circumstances the Commonwealth had ventured into a federal sphere of activity, thus impliedly waiving any defense of sovereign immunity.

The third-party complaints as to the respondent Commonwealth were dismissed (Appendix p. 22a), and summary judgment entered in favor of the Commonwealth and the Virginia Army National Guard upon the grounds that the aforesaid activity was not sufficient nor the kind to constitute entry into a federal sphere, that the decedents were functioning as National Guardsmen and state employees at the time of their deaths, and the statutory law of Virginia precluded suit against the Commonwealth (Appendix pp. 19a and 23a). In entering the Orders, the Court rejected Bell Textron's argument that by performing maintenance and repair work on the aircraft, a proprietary function capable of performance by others, the respondent Commonwealth had entered an exclusive sphere of federal activity which was not exclusively a sovereign function of the Commonwealth, sufficient to constitute a waiver of the Commonwealth's sovereign immunity to suit in tort. (Appendix p. 19a).

Subsequently, by Notice of Motion on May 27, 1977, respondent United States moved for an order of dismissal

under the doctrine enunciated in *Feres* v. *United States*, 340 U.S. 135 (1950), which precluded a tort suit by a serviceman against the United States. This motion was at first denied by the District Court, (Appendix p. 30a-31a), but renewed by Notice of Motion dated July 1, 1977, following this Court's decision in *Stencel Aero Engineering Corporation* v. *United States*, 431 U.S. 666 (1977). The United States District Court for the Eastern District of Virginia granted the motion and entered an order of summary judgment dismissing the United States as a third-party defendant based upon the doctrine enunciated in the *Stencel* decision (Appendix p. 42a-43a).[2] Thereafter, the appeals from all Orders were consolidated for briefing and argument.[3] The United States Court of Appeals for the Fourth Circuit affirmed the orders of the District Court on June 29, 1978, in an opinion which is printed in the Appendix hereto (Appendix pp. 1a-6a). This petition followed.

REASONS FOR GRANTING THE WRIT

The thrust of this Petition as to the respondent United States is that the status of National Guardsmen participating in inactive duty drills is governed by *Maryland for the Use of Levin* v. *United States, supra,* which held that drill status National Guardsmen are state employees and as such their negligent actions do not give rise to a cause of action against the United States, under the Federal Tort Claims Act, 28 U.S.C. § 1346, *et seq.*, by a civilian injured

[2] On July 1, 1977, Stencel Aero filed a Petition for rehearing in that case and, on August 5, 1977, petitioner Bell Textron filed a motion for leave to file a brief as *amicus curiae*. Petitioner Bell Textron's motion was granted on October 3, 1977, and the Petition for Rehearing denied the same day.

[3] Following the entry of the Orders of the District Court, petitioner Bell Textron settled with both plaintiffs, preserving its rights to indemnity and/or contribution from the respondents.

as a result of their negligence. Petitioner submits that in view of the *Maryland* decision, the governmental immunity enunciated in *Feres* and *Stencil* cannot be applied to the circumstances of this case. Although *Stencel* appears to apply to third-party actions involving federally controlled servicemen (*e.g.*, active duty servicemen, reserve components of the United States Armed Forces which are under federal control, and federally employed technicians assigned to National Guard units), it is submitted that it cannot be applied to cases involving National Guardsmen serving in inactive duty drill status under state control without contradicting the rationale and holding of the Court in *Maryland.*

Conversely, the thrust of this Petition as to the respondent Commonwealth is that plaintiffs' decedents and the other maintenance personnel cannot be employees of the Virginia Army National Guard engaged solely in state activity, not amounting to entry into the federal sphere, and at the same time be considered federal employees engaged in federal military service so as to justify the dismissal of the respondent United States under the *Feres/Stencel* doctrine. In summary, the federal interest in control over the events leading up to the accident which is the subject of this litigation leads to the conclusion that the respondent Commonwealth had consciously entered into an activity which is exclusively federal in nature and subject to exclusive federal control, *i.e.*, the maintenance and operation of military aircraft, the training of military personnel, etc. for the national defense. Under the decisions of this Court, it is respectfully submitted that this kind of activity should be deemed a voluntary waiver of the protection of sovereign immunity extended by the Eleventh Amendment to the United States Constitution where the action is commenced in federal courts exercising federal question jurisdiction.

Petitioner Bell Textron respectfully submits that the technical bars interposed to dismiss the third-party complaints are inconsistent and cannot absolve all respondents simultaneously from the obligation of at least one of them to share their proportionate liability for the alleged wrongful death of the decedents in these cases.

1. *The respondent United States should not be permitted to take advantage of the potential inconsistencies arising out of the doctrines espoused by the Court in the Maryland and Stencel decisions.*

The linchpin of the position espoused by the United States in this action is that members of the Virginia Army National Guard have such a unique relationship with the federal government that the third-party action of petitioner Bell Textron is barred by this Court's opinion in *Stencel Aero Engineering Corporation* v. *United States, supra.* (A copy of this opinion is reproduced in the Appendix hereto, at pages 59a-68a, for ease of reference.) However, it cannot be emphasized too strongly that this "unique relationship" asserted to bar these claims against the United States is completely and totally contradictory to the relationship explained and relied upon by this Court in deciding *Maryland for Use of Levin* v. *United States, supra.* (A copy of this opinion is reproduced in the Appendix hereto, at pages 69a-80a, for ease of reference.)

The threshold issue raised by this Petition is whether Captains Ramsey and Henry can be state employees as this Court held in *Maryland* so as to bar claims against the United States under the Federal Tort Claims Act (28 U.S.C. §2680 *et seq.*) for their actions under the doctrine of *respondeat superior,* and at the same time be state employees entwined in such a unique federal relationship under the *Feres/Stencel* doctrine as to preclude a third-party manufacturer from claiming indemnity and/or contribution in a situation where the activities of *other Federal or state employees'* actions were the cause of the accident.

This Court should consider whether the *Feres/Stencel* doctrine, in essence a judicially created exception to the Federal Tort Claims Act, should be extended to third-party claims in cases where the underlying plaintiff was a state employee for whose actions the United States claims no responsibility but for whose death the Government and its other agents are actually responsible.

In *Maryland* v. *United States, supra,* this Court considered the following issue (381 U.S. at 42):

> "The question we decide here is whether a civilian employee and military member of the National Guard is an 'employee' of the United States for purposes of the Federal Tort Claims Act when his National Guard unit is not in active federal service."

The case involved a mid-air collision between a private aircraft and an aircraft owned and operated by the Maryland Air National Guard. The pilot of the Maryland Air National Guard plane was both a member of the National Guard performing monthly drills for the National Guard and was also employed by the Guard in a civilian full-time capacity as aircraft maintenance chief. In reaching its decision, the Court examined both aspects of the pilot's status. On the general question of whether National Guardsmen are state or federal employees, the Court concluded that they were not, as follows (381 U.S. at 48):

> "It is not argued here that military members of the Guard are federal employees, even though they are paid with federal funds and must conform to strict federal requirements in order to satisfy training and promotion standards. Their appointment by state authorities and the immediate control exercised over them by the States make it apparent that military members of the Guard are employees of the States, and so the courts of appeals have uniformly held."

In support of this conclusion that inactive duty drill status National Guardsmen were state employees, the Court examined the constitutional and historical bases for state control of the National Guard and stated as follows (381 U.S. at 46-47):

> "The National Guard is the modern Militia reserved to the States by Art. I, §8, cl. 15, 16, of the Constitution. It has only been in recent years that the National Guard has been an organized force, capable of being assimilated with ease into the regular military establishment of the United States. From the days of the Minutemen of Lexington and Concord until just before World War I, the various militias embodied the concept of a citizen army, but lacked the equipment and training necessary for their use as an integral part of the reserve force of the United States Armed Forces. The passage of the National Defense Act of 1916 materially altered the status of the miltias by constituting them as the National Guard. Pursuant to power vested in Congress by the Constitution (see n. 8), the Guard was to be uniformed, equipped, and trained in much the same way as the regular army, subject to federal standards and capable of being "federalized" by units, rather than by drafting individual soldiers. In return, Congress authorized the allocation of federal equipment to the Guard, and provided federal compensation for members of the Guard, supplementing any state emoluments. *The Governor, however, remained in charge of the National Guard in each State except when the Guard was called into active federal service;* in most instances the Governor administered the Guard through the State Adjutant General, who was required by the Act to report periodically to the

> National Guard Bureau, a federal organization, on the Guard's reserve status. The basic structure of the 1916 Act has been preserved to the present day." [Footnotes omitted; emphasis supplied].

The United States succeeded in *Maryland* in foreclosing claims against it under the Federal Tort Claims Act arising from negligent acts by National Guardsmen on the ground that their employment by the states and the immediate control exercised over them by the state's officers precluded any liability under the doctrine of *respondeat superior.* It is submitted that the conclusion that the drill status National Guardsmen were state employees in *Maryland is in direct contradiction to the rational underlying this Court's decision in Feres* and *Stencel,* that to permit suit against the government by third parties would compromise their status as military employees.

The *Feres* doctrine arose in the context of a claim under the Federal Tort Claims Act by an active duty serviceman injured due to the alleged negligence of government officials. In setting forth the factual background of the case, this Court stated quite clearly it was limiting its consideration to claimants on "active duty." It carefully distinguished, at 340 U.S. 146, the "vital" distinctions between *Feres* and the Court's holding in *Brooks* v. *United States,* 337 U.S. 49 (1949), which held that liability could be asserted against the United States by a serviceman on leave. In the context of servicemen on "active duty" with the Federal Government, this Court considered the issue of "whether the Tort Claims Act extends its remedy to one sustaining 'incident to the service' what under other circumstances would be an actionable wrong" (340 U.S. at 138). In reaching its decision in *Feres* and *Stencel,* this Court relied heavily upon the proposition that "the relationship between the Government and members of its Armed Forces is 'distinctly federal in character'" (340 U.S. at 143), and decided (340 U.S. at 146):

> "We conclude that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service. Without exception, the relationship of military personnel to the Government has been governed exclusively by federal law. We do not think that Congress, in drafting this Act, created a new cause of action dependent on local law for service-connected injuries or death due to negligence. We cannot impute to Congress such a radical departure from established law in the absence of express congressional command."

However, neither the above-quoted conclusion, nor any of the other factors mentioned, seem to have any relevance to a drill-status National Guardsman who is a state employee.

In *Stencel* v. *United States, supra,* this Court extended the *Feres* doctrine to third-party claims against the United States for indemnity and/or contribution. The factors examined in reaching this decision pertain to circumstances peculiar to a military serviceman plaintiff and the applicability of those factors to third-party claims. It appears that the most important of these factors, both in *Feres* and *Stencel,* is the unique federal relationship between a serviceman and his superiors which might be disrupted by the second quessing of military orders in claims brought under the Federal Tort Claims Act.This also seems inapplicable to National Guardsmen who are not subject to the Uniform Code of Military Justice or the orders of active duty Army personnel, *infra,* p. 14.

It has been established beyond any doubt through discovery in these cases that decedents Ramsey and Henry were inactive duty drill status National Guardsmen at the

time of their accident; under the operational control of the Army Aviation Support Facility of the Virginia Army National Guard; and not "in federal service" (10 U.S.C. §§ 3077-3079 and 32 C.F.R. 564.52(b); under the ultimate operational control of the Governor of Virginia. Indeed, discovery in these cases shows that these inactive duty drill status National Guardsmen were not subject to the Uniform Code of Military Justice at the time they were performing inactive duty training drills and that they would not be required to respond to orders of a regular Army officer. Therefore, no disruptive effect on federal military discipline should be inferred where National Guardsmen are subject only to state laws and regulations. Indeed, this Court's decision in *Maryland* suggests that National Guardsmen are state employees with no federal relationship at all to support a claim against the Government by civilians under the Federal Tort Claims Act.

Thus petitioner Bell Textron herein seeks to clarify the Court's decision in *Stencel* as to its applicability to drill status National Guardsmen. The statement of Justice Marshall at page 3 of the dissenting opinion in *Stencel,* in which Justice Brennan joined, indicates the dissenting Justices interpreted the majority opinion to apply only to servicemen under federal control. Justice Marshall states at page 3, "[H]ad the same malfunction in the pilot eject system that caused the serviceman's injuries here also caused that system to plunge into a civilian's house, the injured civilian would unquestionably have a cause of action under the Tort Claims Act against the Government." Under this Court's decision in *Maryland,* no such cause of action would be available to an injured civilian under the Federal Tort Claims Act if the injury was caused by the negligence of a drill status National Guardsman.

Further clouding the application of this Court's decision in *Stencel* to drill status National Guardsmen is the

nature of the record below as to the service status of Captain Donham (the injured plaintiff in *Stencel*) at the time of his injury on June 9, 1973. Captain Donham is variously described by the United States District Court for the Eastern District of Missouri as "a Missouri National Guard pilot"; by the United States Court of Appeals for the Eighth Circuit as "an Air Force Reserve pilot assigned for training to the Missouri Air National Guard"; and by this Court at footnote 1 as "assigned for training to the 131st Tactical Fighter Group, Missouri National Guard." Thus, it is submitted that *Stencel* is inconsistent with *Maryland* with respect to the status of National Guardsmen and the legal ramifications thereof as it affects the liability of the United States and third parties. The upshot is that the United States contends, on the one hand that drill status National Guardsmen are state employees subject to the immediate control of the state's officers when it seeks to preclude claims by civilians under the Federal Tort Claims Act (*Maryland),* and on the other hand, emphasizes a unique federal relationship in persuading this Court to bar third-party claims for indemnity and/or contribution by a manufacturer who is sued by a drill status National Guardsman (the case at bar).

Even the Constitution itself provides for federal control over militiamen only where actually employed by the federal government or in actual federal service. Article I, Section 8, of the United States Constitution provides, in part, as follows:

> "The Congress shall have Power. . .
>
> * * *
>
> To provide for organizing, arming and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority

> of training the Militia according to the discipline prescribed by Congress. . . "

In addition, the President is the "Commander-in-Chief" over militiamen only in time when they are in actual "federal" service of the United States pursuant to Article II, Section 2, of the United States Constitution:

> "The President shall be Commander in Chief . . . of the Militia of the several States, when called into the actual Service of the United States; . . . "

Furthermore, in addition to the Constitution, the Commonwealth of Virginia provides by statute at Code of Virginia § 44-40.1 that members of the Virginia Army National Guard are subject to the military laws of Virginia and are *not in federal service.*

Therefore, since it so well established that drill status National Guardsmen are state employees under state control, and that the plaintiffs in the actions giving rise to these appeals were such drill status National Guardsmen, the respondent United States should not be able to avail itself of the doctrine enunciated in *Feres* and *Stencel* to defeat the third-party claims for contribution and/or indemnity advanced in this case.

2. *The respondent Commonwealth cannot be permitted to benefit from the inherently contradictory positions asserted in the case at bar as to the status of members of the Virginia Army National Guard in order to avoid the decisions of this Court as to waiver of sovereign immunity by a state.*

As indicated above, the thrust of this Petition is directed toward the apparent dichotomy of positions espoused below by respondents. The respondent United States claims immunity from suit by a third party for the actions of its other agents in overhauling and maintaining the aircraft, because the activity of the deceased National

Guard pilots was in effect the same as activity of a member of the military establishment, alleging that the Virginia National Guard operated pursuant to Federal statutes and regulations which preempted the field and, thereby placing the case within *Stencel Aero Engineering Comp.* v. *United States, supra.* However, the respondent Commonwealth claims immunity from suit because its activity in the repair and maintenance areas *is not* federal in nature, not the subject of any federal preemption but rather solely the special activity of the State; thus its involvement cannot be characterized as the kind of activity which would constitute a waiver of sovereign immunity under the doctrine set forth in *Parden* v. *Terminal Railway of the Alabama State Docks Dept.*, 377 U.S. 184 (1964). Petitioner Bell Textron submits that these conflicting positions are mutually exclusive and clearly justify resolution by this Court to permit indemnity or contribution from at least one of the respondents.

The position espoused by the United States discussed above is in sharp contrast to that relied upon by respondent Commonwealth. The argument advanced by the Commonwealth in the Court of Appeals below suggested that the activity of decedents and particularly the activities of their National Guard Unit which forms the basis for petitioner's third-party complaint, i.e., maintenance and repair according to federal standards, was instead local State activity, not subject to regulation by the Congress under the Commerce Clause of the United States Constitution, and, therefore, not of the character to constitute a waiver of sovereign immunity under the doctrine established in *Parden* v. *Terminal Railway, supra.* In propounding this position, the Commonwealth relied upon *Employees of the Dept. of Public Health and Welfare of Missouri* v. *Dept. of Public Health and Welfare of Missouri,* 411 U.S. 279 (1973), in asserting that its activity in connection with the case at bar was not proprietary so as to be considered within the ambit of "commerce", but was

instead governed by the militia clause, Article I, Section 8 of the United States Constitution. In that regard, it should be noted that the states have not only delegated power to the Congress to legislate in matters affecting commerce, but also in the areas covered by the militia clause, wherein it has clearly preempted all contrary state regulations.

This position overlooks three key factors; (1) the arguments and position taken by the United States clearly suggesting that the circumstances were "distinctly federal in character" (as noted above); (2) the erroneous concept that the activity upon which petitioner bases its claim for indemnity and contribution was the maintaining of a militia and the training of the decedents; and (3) the proprietary nature of the maintenance activities performed by persons other than the decedents, Ramsey and Henry. Respondent Commonwealth apparently recognized the inherent dichotomy in the characterization of the decedents as both federal and state employees, but argued that this issue has no effect on its sovereign immunity. Petitioner submits, however, that if the argument of the respondent United States is correct, the "federal sphere of activity is well established" as to the respondent Commonwealth and its sovereign immunity defense becomes diluted if not dissolved.

Bell Textron's claims against the respondent Commonwealth relate to the failure to adequately inspect, lubricate and maintain the helicopter involved in this accident pursuant to the Army regulations covering that function. The inspection, lubrication and maintenance of aircraft is a function which can be performed by third parties on a contract basis, and, therefore, whould be considered proprietary. It is an activity for which the United States could be liable if negligently performed as to non-active duty claimants. Consequently, it is submitted that in performing the same function negligently, pursuant to federal laws and regulations, the respondent Commonwealth and its National Guard voluntarily relinquished their immunity from tort liability to the same extent that the United States relinquished its immunity for the same type of operational negligence. To hold to the contrary would leave the Commonwealth in a position superior to that of the national sovereign.

It should again be noted that the aircraft involved in this accident was owned and overhauled by the respondent United States but maintained by the Army National Guard of the respondent Commonwealth. It was long ago established that the operational level of activity by the United States, if negligently performed, would provide the basis for recovery against the government, notwithstanding the defense created by the Federal Tort Claims Act, 28 U.S.C. 2680(a). See, e.g., *United Air Lines Inc.* v. *Wiener,* 335 F.2d 379 (9th Cir. 1964), *cert. dismissed sub. nom., United Air Lines Inc.* v. *United States,* 379 U.S. 951 (1964); *Eastern Air Lines Inc.* v. *Union Trust Co.,* 221 F.2d 62 (D.C.Cir. 1955), *aff'd sub. nom., United States* v. *Union Trust Co.,* 350 U.S. 907 (1955); *Air Transport Associates Inc.* v. *United States,* 221 F.2d 467 (9th Cir. 1955); and *United States* v. *Hunsucker,* 314 F.2d 98 (9th Cir. 1962).

As indicated in *Kohr* v. *Allegheny Airlines, Inc.,* 504 F.2d 400 (7th Cir. 1974), *cert. denied sub. nom., Forth Corp.* v. *Allegheny Airlines, Inc.,* 421 U.S. 978 (1975), the federal government has preempted the field in the regulation of civil aviation pursuant to the Federal Aviation Act of 1958, 49 U.S.C. §§ 1301, *et. seq.,* and clearly the same preemption appears with respect to military aviation pursuant to the various regulations applicable to the maintenance and operation of the aircraft in the case at bar. There is virtually no co-extensive state jurisdiction in this area; the provinces of the skies are exclusively governed by federal statutes and regulations, and no entity, private or public, enters the field of aviation in the United

States except by federal sanction. The unique federal regulation and control of aviation under the Commerce Clause, together with the paramount federal responsbility for military preparedness, under the War Powers Clause, provide the background for the consideration of the possibility of an implied waiver of sovereign immunity by the respondent Commonwealth.

It defies all logic to assume that Congress would provide for greater liability, through the Federal Tort Claims Act, on the part of the federal government, whose authority regarding national defense and military aviation is exclusive, than for other entities which enter the federal sphere only by the sufferance of the federal government. The better view is that Congress intended and expected any other government entity, which entered the sphere of national defense by permission of the federal government, to enter on an equal footing with the federal government, with the same duties and responsibilities and obligations. For these reasons, contrary to the assertions of the Commonwealth, the factual situation here is strikingly similar to that in *Parden* v. *Terminal Railway, supra,* rather than *Employees of the Dept. of Public Health and Welfare of Missouri* v. *Dept. of Public Health and Welfare of Missouri, supra.*

Under the facts here, if the United States' position has any viability, the Commonwealth has voluntarily entered the exclusively federal sphere of military preparedness, and the Commonwealth of Virginia has waived its sovereign immunity according to the doctrine of *Parden,* and the decision of the appellate court below in *Chesapeake Bay Bridge and Tunnel District* v. *Lauritzen,* 404 F.2d 1001 (4th Cir. 1968), and approved in *Dawkins* v. *Craig,* 483 F.2d 1191 (4th Cir. 1973) *cert denied,* 415 U.S. 938(1974). For these reasons it should not be permitted to exculpate itself from liability to a third party such as petitioner Bell Textron upon the technical

jurisdictional defenses which formed the basis for the dismissal of petitioners third-party complaints.

3. *The decision of the Court of Appeals below is inequitable and in conflict with decisions of other circuits in that it requires an aircraft manufacturer to bear the entire liability under the circumstances of this case wherein a third-party manufacturer with, at most, passive liability, should be entitled to relief under a federal rule of indemnity and contribution.*

As noted above, although ultimately affirming the decisions of the District Court, the Court of Appeals made the following pertinent observation (Appendix hereto, p. 5a):

> "Bell Textron is placed in a very difficult position by the expanding doctrines of products liability and the relatively inflexible doctrines of sovereign immunity and Eleventh Amendment immunity, but unfortunately for it, the law is clearly against it."

Having recognized the inequity of the situation, it is submitted that the decision of the United States Court of Appeals for the Fourth Circuit precluding indemnity or contribution from the respondents herein, is in conflict with the decisions of the Third, Seventh and District of Columbia circuits as indicated below. Therefore, as an alternative, Bell Textron also submits that this Court has the option of correcting such inequities in light of the recent trend in aviation accident litigation toward the adoption and application of a federal common law of contribution and indemnity. This is particularly true in situations where there is substantial federal interest in regulating the operation of aircraft, or in this instance, the design, manufacture, purchase, maintenance and overhaul of aircraft.

A federal rule of contribution and indemnity was first enunciated in *Kohr* v. *Allegheny Airlines, Inc., supra,* (a copy of which is reproduced in the Appendix to this petition at pages 81a-90a) and has been followed in *Humphries* v. *Tann,* 13 Aviation Cases 18,229 (E.D. Mich. 1976); and *In re Paris Air Crash,* 399 F.Supp. 732 (C.D. Cal. 1975). (Since it has not been officially reported, the *Humphries* case is printed in the Appendix hereto at pages 91a-101a.)

Indeed, the significance of *Kohr* is enhanced by the fact that this Court denied certiorari in *Kohr* on the same day it handed down its decision in *Unites States* v. *Reliable Transfer Co. Inc.,* 421 U.S. 397(1975). In *Reliable Transfer,* at the urging of the United States, this Court unanimously repudiated the old "both to blame" rule pertaining to maritime collisions and substituted a new rule of comparative negligence wherein each party is held liable based upon his degree of culpability. The decision was emphatic that comparative negligence is by far the most rational method of allocating damages in a negligence action.

This conclusion is in no way diminished by the fact that *Reliable Transfer* arose out of a maritime claim. Close analysis of the case reaveals that this Court was speaking in much broader terms than the limited admiralty issue that was before it.

First, it is abundantly clear from the opinion that the essential basis for the decision is that the application of comparative negligence brings about the most just result in any context, maritime or otherwise. This Court made it clear that it was no more enthusiastic about the non-maritime doctrine of contributory negligence than the "both to blame" rule. Clearly, the opinion was speaking not only to the federal maritime law, but to federal law in general.

The second factor, which supports the application of *Reliable Transfer* to the instant aviation claim is the predominant federal interest in the regulation of aviation matters. As Mr. Justice Douglas pointed out in *Illinois* v. *City of Milwaukee,* 406 U.S. 91 (1972), at 103:

> "When we deal with air and water in their ambient or interstate aspects, there is a federal common law. . . "

In short, it has been long recognized that the essential nature of the law of the air and the law of the sea are similar.

In adopting a federal common law of contribution and indemnity for aviation accidents, the Court of Appeals in *Kohr* expressed its reasoning for the adoption of such a system as follows (504 F.2d at 403):

> "The basis for imposing a federal law of contribution and indemnity is what we perceive to be the predominant, indeed almost exclusive, interest of the federal government in regulating the affairs of the nation's airways. Moreover, the imposition of a federal rule of contribution and indemnity serves a second purpose of eliminating inconsistency of result in similar collision occurrences as well as within the same occurrence due to the application of differing state laws on contribution and indemnity. Given the prevailing federal interest in uniform air law regulation, we deem it desirable that a federal rule of contribution and indemnity be applied."

The Court in *Kohr* went on to state (504 F.2d at 405):

> "In our judgment the better rule is that of contribution and indemnity on a comparative negligence basis. Under such an approach the trier of fact will determine on a percentage basis the degree of negligent involvement of each party in the collision. The loss will then be distributed in

proportion to the allocable concurring fault. *In allocating the loss where as here the amount involves a settlement and not a judgment,* the trier of fact must also establish what amount would be a reasonable settlement under the circumstances. On reaching such an amount each party contributes according to his degree of fault." [emphasis supplied]

The policy background apparently underlying the development of the *Kohr* doctrine is important, particularly as it relates to this action. Petitioner Bell Textron has only sought to obtain some kind of equitable distribution of the pecuniary responsibility based on an implied contract of indemnity and/or a theory of contribution and thereby put the pecuniary responsibility for the accident which is the subject of this litigation at the feet of those responsible for it. The fact of the matter is that the cause of the accident cannot be primarily attributed to any actions or failures to act by petitioner Bell Textron. It is clear that the findings of the Accident Investigation Board attributing the cause of the accident to inadequate lubrication of a flexible coupling in the number one hanger assembly could logically be explained only by either improper lubrication by the United States Army during overhaul or a loss of lubrication which had gone undetected by Virginia Army National Guard maintenance personnel upon daily inspection of the aircraft. Therefore, the only logical inference from this finding of the Accident Investigation Board is that the responsibility for the failure of the coupling and thus the accident belongs upon either the United States or the Commonwealth and its Army National Guard. Yet, in spite of the compelling evidence as to the cause of the accident, petitioner Bell Textron, as the manufacturer of the aircraft, remained as the sole defendant by virtue of the application of technical defenses raised by respondents in the Courts below.

It is no coincidence that the issue of a federal common law of indemnity and contribution arises at a time when the product liability field has reached a stage of crisis as intimated by the Court of Appeals below, (see pages 3 & 21, *supra*). This Court may certainly take judicial notice of the fact that the Department of Commerce, at the request of the Executive Committee of the Economic Policy Board of the United States, created an Interagency Task Force on Products Liability to conduct studies, beginning in March of 1976, as to the impact of the large volume of products liability litigation on the judicial system and the ability of manufacturers to protect themselves from protracted litigation based on the continuing extension of the limits of the parties with standing to sue.

A multi-volume report by this Task Force has been issued. Pages 67-69 of Volume I of the *Interagency Task Force on Product Liability: Legal Study,* Report No. ITFPL-77/02, National Technical Information Service (1978), reproduced in the Appendix hereto at pages 102a-104a, discuss the indemnity/contribution problem and cite favorably the comparative negligence approach adopted by the New York courts, which is similar to the developing federal common law for aviation accidents, discussed above. *See, Dole* v. *Dow Chemical Co.*, 30 N.Y.2d 143, 331 N.Y.S.2d 382, 282 N.E.2d 288 (1972) for a discussion of the New York approach. The summary of the proposed remedies for the present inequities in the product liability system concludes that the rules of contribution and indemnity should be modified to permit the manufacturer to recover in situations such as the instant case and assigns a "high priority" to such changes.

In addition, others have considered the problem of products liability litigation. It could not be more clear from these studies that the products liability problem is greatly exacerbated by artificial barriers to recovery from

culpable third parties such as those raised by The Federal Tort Claims Act, the Federal Employees Compensation Act, Various State Workmen's Compensation Acts, the *Feres/Stencil* doctrine, etc. It is submitted that such barriers should be strictly construed to prevent further strain upon our reparations system.

This case presents a particularly acute example of the problems involved in military products liability litigation. The petitioner Bell Textron was sued for a product which was manufactured at least ten years ago, and which, upon information and belief, has had at least two different primary users, been used in two tours in Vietnam where it suffered combat damage, been overhauled at least twice and had substantial periodic maintenance and repairs performed. However, since neither respondent was sued herein, petitioner Bell Textron if found to have contributed even one percent (1%) to the cause of the accident by some aspect of design or manufacture, would have had to respond to the full claim or loss. Unless this court adopts an equitable remedy such as that sought herein as to third party relief, the resulting injustice and inequity is obvious.

Respondent United States, in the District Court, suggested that an alternative, and allegedly preferable, mechanism for a contractor to protect himself from the risk of products liability lawsuits founded on injuries resulting from products sold to and owned by the federal government, would be to negotiate an indemnity provision in its contract with the government. Besides ignoring the practical realities of disproportionate bargaining power on the part of the United States in any negotiations with even a large government contractor, the Armed Services Procurement Regulations themselves suggest that even if such a clause could be negotiated, it would fall far short of complete indemnity for the government contractor. *See* 32 C.F.R. §§ 7-203.22, 7-204.21, and 10-404. Also it

should be noted that petitioner Bell Textron does not seek to escape its rightful obligations in a case where injury or death is caused by a defect in its product, but rather seeks equitable relief in a situation when the activities of others produced the cause of the accident.

Based on the foregoing, the argument for the application of a federal common law of contribution and/or indemnity to this case is just as compelling as in *Kohr* and its progeny. The aircraft in question was owned and overhauled by the respondent United States, subsequently maintained and repaired by respondent Commonwealth in accordance with regulations established by the United States Army and adopted by the Virginia National Guard, and decedents were performing inactive duty for training for the Commonwealth at the time of the accident.

In contrast to the predominant and virtually exclusive interests and control exercised by the United States over military aviation, the role of the manufacturer in the events leading up to the accident is extremely remote and passive. Therefore, it is the position of petitioner Bell Textron that its role in the events and circumstances leading to the accident giving rise to these lawsuits and appeals can in its worst light only be characterized as secondary and passive and must be accepted herein as true relevant to this issue in the present posture of these cases. Indeed, this position has never been disputed by the respondents. The primary and active responsibility for the accident rests with either the respondent United States or with the respondent Commonwealth. Therefore, petitioner Bell Textron seeks some equitable distribution of liability in these cases to those who, in view of all the circumstnaces, must be considered to have a primary role in the circumstances proximately causing the accident. It is in search of such an equitable distribution based on contribution and/or indemnity that Bell Textron suggests to the Court that the approach taken by the Court of

Appeals for the Seventh Circuit in *Kohr* v. *Allegheny Airlines, Inc., supra,* presents an ideal solution to the contribution and/or indemnity dilemma which could result in Bell Textron bearing the entire brunt of liability for these accidents if technical bars based on federal or state service or employment are allowed to govern Bell Textron's claim for contribution and/or indemnity.

A guideline for the application of the *Kohr* comparative negligence concept to a case such as the instant one is also found in the equitable approach adopted by the District of Columbia Circuit Court of Appeals in *Murray* v. *United States,* 405 F.2d 1361 (D.C. Cir. 1968). There, the Court of Appeals was faced with a claim for contribution and/or contractual indemnity against the United States based on the provisions of a lease. In reaching its decision, the Court Appeals designed a rule which mitigates, if not eliminates, any inequity resulting from the denial of contribution against the Government as employers of an injured plaintiff. The Court in *Murray* held that where the second of two tortfeasors causing injury compromises a claim, or such tortfeasor cannot be held for contribution because of a legal bar to contribution, the first tortfeasor is nonetheless protected by having his tort judgment reduced by one-half on the theory that one-half of the claim was sold by the injured party when he executed the settlement (405 F.2d at 1365). Since no lien is created under the military compensation statutes, which might require the return of some portion of any recovery by the estate of a serviceman from the manufacturer to the government, no unfairness results in applying the "Murray Credit" to military serviceman cases.

On the other hand, this solution is consistent with both *Stencel* and *Kohr* in that it permits an assessment of the respective liabilities of defendants and third-party defendants, and then permits a credit toward any judgment against defendant in proportion to the established

responsibility of the third-party defendant whose accomodation with the underlying plaintiff is deemed to have taken place under a statutory compensation scheme. In this way, petitioner Bell Textron would bear only its proportionate share of the liability for its allegedly negligent actions or omissions to act and the underlying plaintiffs, subject to exclusive statutory benefit schemes and the respondents can be deemed to have made their peace under the formulas provided in those statutes. *See also, Marant* v. *Farrell Lines Inc.,* 550 F.2d 142 (3rd Cir. 1977); *Dawson* v. *Contractors Transport Corp.,* 467 F.2d 727 (D.C. Cir. 1972); *Brkaric* v. *Star Iron & Steel Co.,* 409 F.Supp. 516 (E.D. N.Y. 1976), wherein the equitable issues are expanded; and *Croshaw* v. *Koninklijke Nedlloyd, B. V. Rijawijk,* 398 F.Supp. 1224 (D.Or. 1975) and cases referred to therein.

The suggestion that the "Murray Credit" approach be modified to reflect a credit related to the degree of fault of the third-party defendant protected by a legal bar is an alternative solution to the inequities described above. Such an approach would give the injured party his full recovery from either of two sources, but it would still insulate the passive or least culpable defendant from payment of an inequitable proportion of the damages. It would also eliminate a windfall that a culpable third-party, such as the United States or the Commonwealth would receive in the case at bar, since they can escape full responsibility while those injured are subsequently reimbursed at the expense of a third-party who is less responsible for the injury. This approach would also be consistent with the "apportioned fault" rule expressed by the Court in *Kohr* and by this Court in *Reliable Transfer,* while recognizing the limitations on indemnity and/or contribution created by *Stencel.*

In summary, therefore, it is submitted that the failure of the United States and the Commonwealth to properly overhaul and maintain the accident aircraft makes it

totally inequitable for the manufacturer to bear complete financial liability for the deaths. Petitioner Bell Textron urges that adoption by this Court of the equitable apportionment formula for contribution and/or indemnity adopted by the Seventh Circuit Court of Appeals in *Kohr*, or the alternative of a modified equitable doctrine providing an apportioned "Murray Credit" similar to that given by the District of Columbia Circuit Court of Appeals, is particularly appropriate in the case at bar to prevent technical bars from creating an inequitable assessment of damages in these accidents.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit in this case, as prayed for herein.

Respectfully submitted,

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Counsel for Petitioner Textron, Inc. and its Division Bell Helicopter Textron

Of Counsel:

HAIGHT, GARDNER, POOR & HAVENS
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United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 77-1888

NADIA B. HENRY, ADMINISTRATRIX WITH THE WILL ANNEXED OF THE ESTATE OF JAMES HOWARD HENRY, deceased,

Plaintiff,

versus

TEXTRON, INC., BELL HELICOPTER TEXTRON, a division of Textron, Inc.,

Appellant,

versus

THE VIRGINIA NATIONAL GUARD AND ITS ADJUTANT GENERAL, THE COMMONWEALTH OF VIRGINIA,

Appellees,

and

THE UNITED STATES OF AMERICA,

3rd-Party Defendant

No. 77-1889

ELMER W. RAMSEY, ADMINISTRATOR OF THE ESTATE OF PHILIP R. RAMSEY, deceased,

Plaintiff,

versus

TEXTRON, INC., BELL HELICOPTER TEXTRON, a division of Textron, Inc

Appellant,

versus

THE VIRGINIA NATIONAL GUARD AND ITS ADJUTANT GENERAL, THE COMMONWEALTH OF VIRGINIA,

Appellees,

and

THE UNITED STATES OF AMERICA,

3rd-Party Defendant

No. 77-2010

NADIA B. HENRY, ADMINISTRATRIX WITH THE WILL ANNEXED OF THE ESTATE OF JAMES HOWARD HENRY, deceased,

Plaintiff,

versus

TEXTRON, INC., BELL HELICOPTER TEXTRON, a division of Textron, Inc.,

Appellant,

versus

THE UNITED STATES OF AMERICA,

Appellee,

and

THE VIRGINIA NATIONAL GUARD AND ITS ADJUTANT GENERAL, THE COMMONWEALTH OF VIRGINIA,

3rd-Party Defendant

No. 77-2011

ELMER W. RAMSEY, ADMINISTRATOR OF THE ESTATE OF PHILIP R. RAMSEY, deceased,
Plaintiff,

versus

TEXTRON, INC., BELL HELICOPTER TEXTRON, a division of Textron, Inc.,
Appellant,

versus

THE UNITED STATES OF AMERICA,
Appellee,

and

THE VIRGINIA NATIONAL GUARD AND ITS ADJUTANT GENERAL, THE COMMONWEALTH OF VIRGINIA,
3rd-Party Defendant

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge

Argued June 9, 1978 Decided June 29, 1978

Before HAYNSWORTH, Chief Judge, BUTZNER, Circuit Judge and WARRINER*, District Judge

Carroll E. Dubue (Haight, Gardner, Poor & Havens, Temple L. Ratcliffe, William B. O'Connell, Jr. on brief) for Appellant; Robert P. Kyle, Assistant Attorney General (Anthony F. Troy, Attorney General of Virginia on brief) and John Cordes, Attorney, Dept. of Justice on brief) for Appellees.

* District Judge for the Eastern District of Virginia, sitting by designation

HAYNSWORTH, Chief Judge:

Bell Helicopter Textron was sued by the estates of two former pilots of the Virginia National Guard, who were killed when a helicopter, manufactured by Bell Textron, crashed. Bell Textron had sold the helicopter to the United States in 1966 which, after using the helicopter for several years, lent the helicopter to the Virginia National Guard. Bell Textron impleaded as third-party defendants the United States, the Commonwealth of Virginia, and the Virginia National Guard, seeking indemnity and contribution in the event Bell Textron was held liable. Though these third-party defendants were more responsible for the crash than Bell Textron, the district court granted summary judgment for each of the third-party defendants because of their immunity to this suit. During the pendency of this appeal, Bell Textron settled the claims of the original plaintiffs.

Bell Textron is placed in a very difficult position by the expanding doctrines of products liability and the relatively inflexible doctrines of sovereign immunity and Eleventh Amendment immunity, but unfortunately for it, the law is clearly against it.

The recent decision in *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666 (1977), clearly forecloses Bell Textron's claim under the Federal Tort Claims Act against the United States. Without a waiver under that Act, the doctrine of sovereign immunity bars any claim by Bell Textron against the United States. Similarly, Bell Textron's claims against the Commonwealth and the Virginia National Guard, at least in federal court, are barred by the Eleventh Amendment. The Commonwealth has not expressly consented to be sued in this type of case, and, after considering all of the circumstances and relevant factors, we conclude that the Commonwealth has not implicitly waived its immunity to this type of lawsuit. *See Employees* v. *Missouri Public Health Dept.*, 411 U.S. 279 (1973); *Parden* v. *Terminal R. Co. of Alabama*, 377 U.S. 184

(1964); *Petty* v. *Tennessee-Missouri Bridge Comm'n.*, 359 U.S. 275 (1959); *Dawkins* v. *Craig*, 483 F.2d 1191 (4th Cir. 1973), *cert. denied*, 415 U.S. 938 (1974); *Chesapeake Bay Bridge & Tunnel District* v. *Lauritzen*, 404 F.2d 1001, 1003 (4th Cir. 1968).

We believe the district court correctly interpreted the law and granted summary judgment for each of the third-party defendants. The judgments of the district court are affirmed.

AFFIRMED.

JUDGEMENT

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 77-1888

NADIA B. HENRY, ADMINISTRATRIX WITH THE WILL ANNEXED OF THE ESTATE OF JAMES HOWARD HENRY, DECEASED,

Plaintiff,

versus

TEXTRON, INC., BELL HELICOPTER TEXTRON, a division of Textron, Inc.,

Appellant,

versus

THE VIRGINIA NATIONAL GUARD AND ITS ADJUTANT GENERAL, THE COMMONWEALTH OF VIRGINIA,

Appellees,

and

THE UNITED STATES OF AMERICA,

3rd Party Defendant

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideraiton whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

WILLIAM K. SLATE, II

Clerk

JUDGMENT

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 77-1889

ELMER W. RAMSEY, ADMINISTRATOR OF THE ESTATE OF PHILIP R. RAMSEY, deceased

Plaintiff,

versus

TEXTRON, INC., BELL HELICOPTER TEXTRON, a division of Textron, Inc.,

Appellant,

versus

THE VIRGINIA NATIONAL GUARD AND ITS ADJUTANT GENERAL, THE COMMONWEALTH OF VIRGINIA

Appellees,

and

THE UNITED STATES OF AMERICA,

3rd Party Defendant

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

WILLIAM K. SLATE II

Clerk

JUDGMENT

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 77-2010

NADIA B. HENRY, ADMINISTRATRIX WITH THE WILL ANNEXED OF THE ESTATE OF JAMES HOWARD HENRY, deceased,

Plaintiff,

versus

TEXTRON, INC., BELL HELICOPTER TEXTRON, a division of Textron, Inc.,

Appellant,

versus

THE UNITED STATES OF AMERICA,

Appellee,

and

THE VIRGINIA NATIONAL GUARD AND ITS ADJUTANT GENERAL, THE COMMONWEALTH OF VIRGINIA,

3rd Party Defendant

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

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WILLIAM K. SLATE II

Clerk

JUDGMENT

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 77-2011

ELMER W. RAMSEY, ADMINISTRATOR OF
THE ESTATE OF PHILIP R. RAMSEY, deceased,
Plaintiff,

versus

TEXTRON, INC., BELL HELICOPTER TEXTRON,
a division of Textron, Inc.,
Appellant,

versus

THE UNITED STATES OF AMERICA,
Appellee,

and

THE VIRGINIA NATIONAL GUARD AND ITS
ADJUTANT GENERAL, THE COMMONWEALTH OF VIRGINIA,
3rd Party Defendant

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby affirmed.

WILLIAM K. SLATE II
Clerk

VIRGINIA:

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT COURT
Alexandria Division

NADIA B. HENRY, *Plaintiff,* -vs- TEXTRON, INCORPORATED, *Defendant.*	C/A-76-920-A
ELMER W. RAMSEY, *Plaintiff,* -vs- TEXTRON, INCORPORATED, *Defendant.*	C/A-76-921-A

Alexandria, Virginia

Friday, April 1, 1977

Transcript of the motion proceedings held in the above-captioned matters.

BEFORE:

The Honorable ALBERT V. BRYAN, JR., Judge

APPEARANCES:

FOR THE PLAINTIFF:

PHILIP SILVERMAN, ESQUIRE

FOR THE DEFENDANT:

WILLIAM B. O'CONNELL, ESQUIRE
-and-
KARROLL DUBUC, ESQUIRE

FOR THE THIRD-PARTY DEFENDANT:

ROBERT P. KYLE, ESQUIRE

PROCEEDINGS

THE CLERK: Civil Action 76-920 and 921-A, Nadia B. Henry and Elmer W. Ramsey, vs. Textron, Incorporated.

THE COURT: It comes on on the third-party defendant's motion to dismiss, and the defendant's motion for protective order.

MR. KYLE: Good morning, Your Honor. My name is Robert Kyle. I am an Assistant Attorney General, and I represent the Commonwealth of Virginia and the Virginia Army National Guard.

THE COURT: I have read your memorandum.

MR. KYLE: Thank you, Your Honor. I would like to respond this morning, without going over any of the facts, and trusting the Court is familiar with it, to some of the contentions that were raised in the memorandum in opposition to our motion to dismiss that was filed by Textron.

If I could take just a second to summarize what seems to be Textron's position, that is, that we should belong in this case.

THE COURT: That you have waived your immunity?

MR. KYLE: Yes, sir, and it seems to me, that the Commonwealth and its National Guard took clear and conscious steps into the exclusive domain of national and military preparedness and federal aviation.

Your Honor, I would submit that all of the cases cited by Textron in support of its contention that Virginia has waived sovereign immunity involve States which engage in activities under the Commerce Clause of the Constitution.

Parden vs. Terminal Railroad, for example, the question was whether a State that owns and operates a railroad that runs in interstate commerce may successfully plead sovereign immunity in a federal court suit brought under the FELA; and the Supreme Court held that the Congress intended that the FELA apply to all carriers, including railroads that were run by States.

Likewise, the Fourth Circuit in the case that it has addressed the issued, that is, Chesapeake Bay and Tunnel District vs. Lauritzen, where the Fourth Circuit held that Virginia's petition for permission to occupy navigable waters with bridges and tunnels constituted entry into the federal realm of interstate and foreign commerce.

The Lauritzen case seems to have been the controlling case. At least, it was certainly cited and quoted by Judge Kellum in another admiralty case, West vs. M/V Coan River, which was cited by Textron in its brief.

I think the Court should be aware that the sweeping language in Parden was substantially curtailed in Employees Department of Public Health vs. Missouri.

In that case—.

THE COURT: (Interposing) I am familiar with that case.

MR. KYLE: Okay, Your Honor. It seems to me, Your Honor, that the result of these cases is that, before a State can be held to have lost its sovereign immunity, or to be subject to suit, notwithstanding the Eleventh Amendment, there has to be activity in interstate commerce, and some other factors, and the cases teach that the factors are consent or waiver in the federal legislation.

It can be conduct that is not governmental—in other words, proprietary, or possibly as a result of the Lauritzen case, possibly activity—which is only at the sufferance of the federal government.

Now, when we look at what's involved in this case, I think it's important to recognize that the National Guard is the modern equivalent of the militia.

The Supreme Court has recognized that. In Virginia, the National Guard is by statute a component of the militia of the Commonwealth.

So, the question then becomes, whether the National Guard training activities that gave rise to the accident, that is the subject of this litigation, are subject to litigation under the Commerce Clause, which, as I say, has been the sine qua non in every case that's found a waiver or a loss of a sovereign state's jurisdiction.

Now, obviously, training the militia is quite unlike running a railroad. Moreover, it doesn't fall under regulation by commerce under the Commerce Clause at all.

Article 1, Section 8, which gives the power of Congress, also gives Congress the power to provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the State respectively, the appointment of officers and the training of the militia according to the discipline prescribed by Congress.

I think that's important. We are not talking about a Commerce-Clause activity here. We're talking about a Militia-Clause activity. In the absence of federal activity—and, historically, the federal government didn't get involved in this until at least 1900, effectively until 1903—the States did it all.

So, we are not talking about an exclusive federal realm at all. We're talking about a joint function of the states and the federal government.

The other point that I would bring to the Court's attention, is a case called Maryland, for the use of Levin, vs. United States, which was cited in Textron's brief and comes at 381 U.S. 41, and I think that's important.

In that case, the petitioners' decedents were victims of an accident caused by a Maryland Air National Guard officer, who was also a civilian employee, and the question before the Court was whether the United States was subject to liability under the Federal Tort Claims Act.

The Court, in that opinion, described at some length the symbiotic relationship between the States and the federal government in National Guard activities, and, in holding that military and civilian personnel of the National Guard ought to be treated for purposes of the Tort Claims Act as State employees, the Supreme Court recognized that its decision left those who suffered from accidents like that without any effective legal redress for their losses, and, there was no hint, that by virtue of National Guard activities, the State of Maryland had waived her sovereign immunity.

The implication is quite clearly to the contrary, because the Supreme Court said, in Footnote 39, "That the State of Maryland has not, so far as we know, waived its sovereign immunity."

That's the question of sovereign immunity—in fact the waiver of it—seems to have been left in National Guard matters to the States.

Textron has very candidly admitted in its brief that Virginia in no way has affirmatively done anything to waive—at least by its statutes, by its constitution, and there are no Court of Virginia cases that have held, that the Commonwealth in National Guard matters has waived its sovereign immunity.

The last point that I would like to make, is that Textron suggests that the Commonwealth sovereign immunity does not ascend to the Virginia National Guard.

I think there are a number of cases which are dispositive of that contention, the best one being—or at least an outstanding example—is Ford Motor Company vs. the Department of the Treasury at 323 U. S. 459.

A case in the Eastern District is Medicenters of America vs. Commonwealth of Virginia, 373 F.Sup. 305.

Quite clearly, the protections afforded by sovereign immunity in the Eleventh Amendment apply to the State agencies,

and, in view of those cases, and the constitutional provision that it does entitle the Commonwealth of Virginia to engage in training the National Guard, I respectfully submit that our motion to dismiss on behalf of both the Commonwealth and the Virginia Army National Guard should be granted.

MR. O'CONNELL: Good Morning, Your Honor. I would like to move Mr. Karroll Dubuc of the District of Columbia bar —.

THE COURT: (Interposing) The Motion is granted.

MR. DUBUC: Good morning, Your Honor. This case comes to this court in the context of a product liability case.

THE COURT: I am familiar with your pleadings and your brief.

MR. DUBUC: We have read the briefs as well, Your Honor, and we believe the issue here is whether, in the course of the factual context, the State of Virginia has, in fact, ventured into a federal sphere.

THE COURT: Is the National Guard a federal sphere? Isn't it traditionally a State function?

MR. DUBUC: Yes, Your Honor, but both the State of Maryland case cited, and also other cases which have not yet been raised on the issue of—for example, Orsonlich vs. the Commonwealth of Puerto Rico, and others—I have the cite for that for Your Honor—indicate that there are two functions of the National Guard, one as a State militia, and, two, when it ventures into the active federal service, for example, when it functions as an arm of the Army, or, in the case of the Air National Guard, as an arm of the Air National Guard.

Now, the facts in this case, as far as both decedents are not absolutely certain at this time, as we indicated in our moving papers, because we have not had a chance to take the depositions of the National Guard, which are scheduled for next Wednesday and Thursday in Richmond.

We believe that the status of the decedents, and the relationship of the ownership of the airplane, the facts — and how it was loaned or how it is arranged between the United States and the National Guard, the fact that the National Guard does maintain the airplane and the United States Army regulations, procedures and manuals; trains under Army procedures and manuals.

In this particular case —.

THE COURT: (Interposing) But there is no suggestion in any of the federal legislation on the National Guard, that the immunities traditionally enjoyed by the States are being lifted, is there?

MR. DUBUC: Well, Your Honor, some of the cases indicate that, if you get into a sphere of commerce, as mentioned by counsel, there are cases, the Parden Case in the railroad situation, where —

THE COURT: (Interposing) But in the Employees against the Maryland Public Health Service, didn't that indicate that the Parden doctrine is a pretty narrow exception to the Eleventh Amendment Immunity?

MR. DUBUC: That's true, Your Honor, but, for example, in this particular case, you do have interstate flight, you have a flight from Virginia to the Patuxant Civil Air Station. That's in Maryland, unless my geography is faulty.

You could have had a flight—and these National Guard and Reserve training functions go all over the United States. There are factual questions as to whether or not they are functioning at a given moment for the Reserve, for the National Guard, or for the federal interest.

We are not prepared, of course, as we indicate, to fix at this point, exactly what function this aircraft was performing.

We are suggesting to Your Honor, I believe, that we do have an opportunity —.

THE COURT: (Interposing) You are suing the National Guard, so presumably, they were performing a function involved with the National Guard.

MR. DUBUC: Well, we're suing the National Guard and the error, if any, of the National Guard in this case, is going to be in connection with the inspection and maintenance of the airplanes, according to the federal manuals that they use, and we are suing the government —.

THE COURT: (Interposing) In the Employees against the Missouri Public Health Department, wasn't the regulation federally imposed on the FELA there?

MR. DUBUC: Yes, Your Honor, but —.

THE COURT: (Interposing) Were there not pervasive federal regulations in the field?

MR. DUBUC: That's true, Your Honor, but in this particular instance, we feel—and this may well be presenting a case of first impression to Your Honor—we feel, that the power to regulate the national defense, and to make whatever regulations and rules and procedures are necessary, as is involved in the Army-National Guard relationship here, is equally as strong, and as broad, as the commerce power under the Commerce Clause of the Constitution.

We would like an opportunity to establish the facts, and to determine here, whether the National Guard, by itself, is functioning in the federal sphere, and if not, of course, as we mentioned, if not, then there may still be an issue as to whether they remain a third party defendant.

But it's a different issue, it's an issue of whether or not the decedents were employed by the State of Virginia, and, if so, an exclusive remedy exists only to the State, and in which instance, we will then go forward against the federal government.

But, we would like the opportunity to prove those facts, and have that alternative under the law. We believe that the

law, at least to the extent that the facts indicate at the present time, suggests that the National Guard has ventured, or may have ventured in this instance, into a federal sphere.

THE COURT: I don't think the facts which you say are yet to be developed through discovery, affect the immunity question.

I think this case is governed by Employees against Missouri Public Health Department and the Dawkins Case in the Fourth Circuit, rather than Parden and the Chesapeake Bay Bridge Case.

The federal regulation in this case is no more preemptive than it was for the Dawkins Case or the FELA and Employees Case.

This isn't a case where the State has ventured out into an exclusive federal domain.

This is a case where the State is still functioning in its traditional and primary function of operating the National Guard.

It is not a proprietary activity, nor does the federal legislation on National Guard in any way suggest that the immunity traditionally suffered by the State is to be lifted.

The Parden Case is, as Justice Douglas points out in the Employees Case, the narrow exception to the waiver of immunity, or the immunity traditionally enjoyed by the States, and for these reasons, the motions to dismiss filed by both the Commonwealth and the National Guard are sustained, since I can see no distinction to be made between the two under the circumstances of this case.

MR. DUBUC: Your Honor, may I request that in that finding, in your ruling, that a finding be made to dismiss, to the effect that the activities of the decedents and the National Guard helicopter in this case, were indeed in the furtherance of the Virginia National Guard activities, as Your Honor has indicated.

THE COURT: I won't make any specific findings, but they have to be.

If you seek to sue the National Guard, presumably, you have to show that activities of the National Guard were those that created or caused the loss that you may have sustained to the plaintiff.

So, it's implicit, it seems to me, in the ruling.

MR. DUBUC: The reason I make the request, Your Honor, is that we are going to hear the issue again, because I anticipate the government will be coming in with a motion to show.

THE COURT: Well, we will take that up afterwards.

MR. DUBUC: Very well.

CERTIFICATE OF REPORTER

COMMONWEALTH OF VIRGINIA
COUNTY OF FAIRFAX

I, CAROLE J. BODEN, being a Shorthand Reporter, do hereby certify that I was authorized to and did report in shorthand the above-and-foregoing proceedings, and that thereafter my shorthand notes were reduced to typewriting under my supervision, and I further certify that the pages numbered 2 through 31, inclusive, contain a true and correct transcription of my shorthand notes taken therein.

Done and signed this 13th day of April 1977, in the County of Fairfax, Commonwealth of Virginia.

CAROLE J. BODEN

Carole J. Boden, Court Reporter

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

NADIA B. HENRY, etc., and ELMER W. RAMSEY, etc.,
Plaintiffs,

v.

TEXTRON, INC., BELL HELICOPTER TEXTRON, a division of Textron, Inc.,
Defendant and Third-Party Plaintiff,

v.

THE UNITED STATES OF AMERICA, THE VIRGINIA NATIONAL GUARD, and its ADJUTANT GENERAL, and THE COMMONWEALTH OF VIRGINIA,
Third-Party Defendants.

Civil Action Nos.
76-920-A
76-921-A

ORDER

This cause came to be heard upon the Motion to Dismiss filed on behalf of the Virginia National Guard and the Commonwealth of Virginia, and upon consideration of the memoranda filed in support and in opposition thereto, and oral argument thereon, the Court being of the opinion that the motion should be granted, and that the Third-Party Complaint filed by Textron, Inc., against the Virginia National Guard and the Commonwealth of Virginia should be dismissed, and being of the further opinion that a final judgment should be entered from which an appeal will lie, there being no just reason for delay.

It is Ordered, Adjudged and Decreed, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, that there is no just reason for delay, and that entry of the aforesaid final judgment should be, and it is hereby, expressly directed; and

It is Further Ordered, Adjudged and Decreed, that the third-party complaint be, and it is hereby dismissed, and a summary judgment granted, as against third-party complainants and in favor of third-party defendants.
April 11, 1977.

United States District Judge

I ask for this:

ROBERT P. KYLE

Robert P. Kyle
Counsel for Virginia
National Guard and
Commonwealth of Virginia

Seen and objected to:

CARROLL E. DUBUC

Carroll E. Dubuc
Counsel for Textron, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

NADIA HENRY and ELMER RAMSAY,
Plaintiffs,
-vs-
TREXTRON, INCORPORATED,
Defendant.

Civil Action No. 76-920-A and 921-A

Friday, June 3, 1977

Alexandria, Virginia

Transcript of the Motion Proceedings held in the above-captioned matter.

BEFORE:

The Honorable ALBERT V. BRYAN, JR., Judge
United States District Court

APPEARANCES:

FOR THE PLAINTIFFS:

ROBERT W. KING, ESQUIRE
PHILIP SILVERMAN, ESQUIRE
CARROLL E. DUBUC, ESQUIRE
TEMPLE L. RATCLIFFE, ESQUIRE
WILLIAM B. O'CONNELL, JR., ESQUIRE

THE COURT: I've read your brief.

MR. KING: Very well, Your Honor.

Then I will speak to the reply brief to our motion to dismiss if I may, which I believe was filed, I think, yesterday by counsel for Textron.

The main point of Bill Textron's policy brief goes to the question of whether National Guardsmen are covered under Ferris. I believe that it is stated at Page 15 that the issue of whether the National Guardsmen involving the Donner Case and Extenserario (phonetic) Engineering Corporation versus the United States Case were acting in active federal service or inactive duty —.

THE COURT: (Interposing) Can I decide on this record that these men were in the federal service?

MR. KING: I believe you can, Your Honor.

THE COURT: Tell me how I can, because I sort of feel like that I can't. That is the problem I have with the —.

MR. KING: We are not arguing contrary to the Maryland versus the United States Case that they were not employees, so to speak, for the purposes of responding, of the National Guard of the Commonwealth of Virginia, but that is much narrower in scope than the incident-to-service test.

I believe the Lane Case, Lane versus United States, although it predates the Maryland versus U. S. Case, speaks very clearly on that subject matter, and indeed it was considered at that time, whether Major Land (phonetic), who was a National Guardsman, whether it was incident-to-service.

It is pointed out in that brief while they are under the ultimate control of the Governor of Indiana and the Adjutant General, it was still incident-to-service.

They were flying a U. S. military—Major Land (phonetic) was flying a U. S. military airplane. He was receiving

compensation through the National Guard Bureau of the United States, and the compensation to his widow came from the National Guard Bureau of the United States.

I believe that the training that is ongoing of these individuals, who are members of either the Airforce, National Guard, or the Army, Air National Guard, is for only one purpose, to train them to be—it's called combat readiness training, in the event of a national emergency.

THE COURT: Did you want to respond to that?

MR. DUBUC: Your Honor, we certainly agree with Your Honor's suggestion that on this record —.

THE COURT: (interposing) You take the ball and run with it?

MR. DUBUC: Yes, Your Honor, we certainly, that on this record, particularly in view of the testimony of the supervising security officer of the two decedents that they were not in federal service under the circumstances, and in view of the holdings in the various expressed language of the Maryland Case and in view of the provisions of the Virginia statutes indicating that if they are not in federal service, they are indeed subject to the control and authority of the Governor of the Commonwealth.

On this record and under those cases, the Maryland Case being the definitive statement, we believe--we do not see how they can be considered in federal service at this time.

We would also note of course that-- and I believe Your Honor has already implied that in dismissing the complaint when the issue came before Your Honor with respect to the Virginia National Guard in the State of Virginia.

If they were in federal service, then of course, under that other argument, they may have crossed into the federal sphere, and I believe Your Honor found they had not.

We abided by that, and the order has been entered. So on this record, we certainly agree they cannot be found in federal service. If they are not in federal service, then we are not concerned with the Ferris Doctrine.

The affirmative defenses based thereon should be dismissed. Similarly, based upon the Virginia law, we are not concerned here with real, expressed contractual claims. We are claiming indemnity for claims arising out of the breach-of-warranty/strict liability, whatever it may be catagorized, that is found in the complaint itself. And that sounds in tort according to both the Virginia cases and the Fourth Circuit cases.

Finally, with respect to the jurisdictional defense, which is based upon either discretionary versus control activity, clearly the operation of a maintenance facility to overhaul aircraft, which is the basis of that claim here, is one that could be done by private persons.

Indeed, the record now indicates, although again those depositions have not been--the transcripts haven't been completed, but the record now indicates that formerly the helicopter and other manufacturers performed similar services for the Government at prior dates.

So we are dealing with an operational type of activity that any manufacturer or any repair or overhaul facility could perform, and, regardless of the discretionary nature of regulations, if the activity is performed negligently, of course, the cases, as we have referred to in our brief, are legion. The Government may be held for those.

So we believe in all three of the affirmative defenses, we are entitled to an order dismissing them and that the Government's motion to dismiss the third-party complaint on those grounds should be denied.

THE COURT: I don't think the record at this stage is sufficient to enable me to say either that the plaintiffs were in federal service or that the affirmative defenses asserted are

without merit. I think it's going to require development of those at trial or otherwise to let the court be able to determine them.

Therefore, the motion to dismiss filed by the United States, that is filed to dismiss the third-party complaint, is denied, and the motion to strike the affirmative defenses is likewise denied.

CERTIFICATE OF REPORTER

COMMONWEALTH OF VIRGINIA
CITY OF ALEXANDRIA } ss.

I, EDWARD D. MCCOY, being a Registered Professional Reporter and Official Court Reporter, do hereby certify that I was authorized to and did report in stenotypy the above-and-foregoing proceeding, and that thereafter my stenotype notes were reduced to typewriting under my supervision, and I further certify that the pages numbered 8 through 12, inclusive, contain a true and correct transcription of my stenotype notes taken therein.

Done and signed this day of , 1977, in the City of Alexandria, Commonwealth of Virginia.

Edward D. McCoy, R.P.R.
Official Court Reporter

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

NADIA B. HENRY, Administratix with the Will Annexed of the Estate of JAMES HOWARD HENRY, Deceased,

and

ELMER W. RAMSEY, Administrator of the Estate of PHILIP R. RAMSAY, Deceased,

Plaintiffs,

-against-

TEXTRON, INC., BELL HELICOPTER TEXTRON, a division of Textron, Inc.

Defendant and Third-Party Plaintiff,

-against-

THE UNITED STATES OF AMERICA,

Third-Party Defendant.

Civil Action Nos.
76-920-A
76-921-A

ORDER

THIS MATTER, having come on for hearing before the undersigned Judge in the above-entitled Court upon the Motion of Defendant and Third-Party Plaintiff TEXTRON, INC., and its division BELL HELICOPTER TEXTRON (hereinafter "Bell Textron"), for Partial Summary Judgment on the Pleadings Dismissing the Second, Third and Sixth Affirmative Defenses of Third-Party Defendant, the UNITED STATES OF AMERICA, and the Motion of Third-Party Defendant, the UNITED STATES OF AMERICA, to Dismiss the Third-Party Complaint, and

This Court having considered said motions and all oppositions thereto and pursuant to Rule 12(b)(6) and Rule 56(a) and (b) of the Federal Rules of Civil Procedure, it appearing that there is an insufficient record to permit a determination of the issues presented, it is hereby

ORDERED that Defendant and Third-Party Plaintiff Bell Textron's Motion for Partial Summary Judgment on the Pleadings Dismissing the Second, Third and Sixth Affirmative Defenses of the Third-Party Defendant, the United States of America be and the same hereby is DENIED; and it is

FURTHER ORDERED that the motion of the Third-Party Defendant, the United States of America, to Dismiss the Third-Party Complaint, be and the same hereby is DENIED: and it is

Dated: 6/9/77

U.S.D.J.

Seen and objected to:

CARROLL E. DUBUC

Carroll E. Dubuc
Counsel for Textron, Inc.

ROBERT W. KING

Robert W. King
Counsel for the United
States of America

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

ELMER RAMSEY AND NADIA HENRY, *Plaintiffs,* -vs- TEXTRON, INCORPORATED, *Defendant.*	**CIVIL ACTION 76-920/921-A**

Alexandria, Virginia

Friday, July 22, 1977

Transcript of the motion proceedings held in the above-captioned matter.

BEFORE:

The Honorable ALBERT V. BRYAN, JR., Judge,
United States District Court

APPEARANCES:

FOR THE PLAINTIFFS:

DONALD W. MCDOLE, ESQUIRE

For the Defendant Textron:

WILLIAM J. SWEENEY, ESQUIRE
WILLIAM B. O'CONNELL, ESQUIRE
TEMPLE L. RATCLIFFE, ESQUIRE

FOR THE GOVERNMENT:

ROBERT W. KING, ESQUIRE

PROCEEDINGS

THE CLERK: Civil Action 76-920 and 921, Elmer Ramsey and Nadia Henry versus Textron, Incorporated.

MR. O'CONNELL: I would like to move Mr. William Sweeney's admission. He is a member of the firm of Haight Gardner in New York.

THE COURT: Delighted to have you.

MR. SWEENEY: Good morning, Your Honor.

THE COURT: This comes on on the government's motion for reconsideration of the ruling on the government's motion to dismiss and on a discovery motion.

Let me hear from the government. I have read your memorandum, and I have reread the Stencil case. I think I am aware of what the point of your motion is.

MR. KING: Your Honor, this morning the government did file a supplemental attachment to its motion. The government was not aware that the status of Donnan was going to be in question at any time.

The government had assumed that he was a National Guardsman, and believes that the attachments that we are filing supplementally do establish that.

In Bell Textron's reply brief they have raised some questions as to whether—or they have stated that they believe that all counsel had previously assumed that there was some Federal aspect to Captain John C. Donnan's service.

I have just the other day read through the original brief in support of the motion for a summary judgment in the case of John C. Donnan versus The United States in the Missouri District Court, and a greater portion of that brief was devoted to the National Guard, and the government in that brief cited five cases which have held that National Guardsmen cannot recover against the United States.

I have not seen anything cited by Bell Textron to show that a National Guardsman may recover against the United States in an action for negligence.

I think that the government's brief does go into sufficient detail as to the government's belief that these cases are in support of our motion.

MR. SWEENEY: Good morning, Your Honor. My name is Bill Sweeney. I represent Bell Textron.

We are arguing this morning on the first instance that the decision on the government's motion for reconsideration should be postponed, consistent with this Court's previous ruling, and that further discovery should be had on the precise status of the claimants in this case and Captain Donnan.

I can inform the Court, consistent with our brief we filed yesterday, that a petition for rehearing has been filed in the Supreme Court of the United States.

THE COURT: You have got a right uphill battle on that. It was a '72 decision with Marshall and Brennan dissenting.

MR. SWEENEY: It has been filed, and it is pending. We hope to file an analogist brief in that case. It requires a motion to do so, and we are going to make that motion shortly.

In addition, discovery is still in progress, consistent with this Court's order. Mr. Dubuc is this morning with Mr. Silverman taking the deposition of Major Simon of the Virginia National Guard, and we feel that that deposition and his testimony will be helpful.

We deposed Mr. Heist of the National Guard on Wednesday, and I think the government has had an opportunity to know that we are interested in the background of Captain Donnan, whether in fact, he was a National Guardsman, so we can determine exactly what it was and consistently apply the decision in Maryland and in Stencil.

I know Mr. King has introduced several exhibits dealing with the background of Mr. Donnan.

We have not had an opportunity to examine any witnesses, although we have requested Captain Muller's successor. He filed the affadavit on behalf of the United States.

We have not had an opportunity to examine his successor or to examine the file on Captain Donnan. I am told now it may require a court order to do so, and I think we should be entitled to that.

I do have some comments on the merits of this motion, but perhaps I should withhold those until the Court decides whether it would like to evaluate the motion today.

THE COURT: Oh, I intend to evaluate it today.

MR. SWEENEY: Very well, Your Honor. It seems to Bell Textron--.

THE COURT: (Interposing) And I am familiar with your response to the motion for reconsideration.

MR. SWEENEY: Yes, sir. Does the Court have in hand the brief we filed yesterday?

THE COURT: Yes.

MR. SWEENEY: We feel that the Stencil decision not only doesn't make sense, but wasn't intended to apply to National Guardsmen--.

THE COURT: (Interposing) It's all right for you to say that, but I wouldn't say that when you file your motion for reconsideration before the Supreme Court.

MR. SWEENEY: I only mean with respect to National Guardsmen, not in general.

I have spoken with counsel for Stencil in that case, and he has advised me that they proceeded through the appeal structure on the basis that they were dealing with a National Duty Serviceman.

THE COURT: Is that a valid distinction?

MR. SWEENEY: I think so, Your Honor. I think the control structure over federal servicemen, on-duty, active people, reserve prople, is entirely different from the state control exerted over National Guardsmen, and I think that is where we have the contention between the holding in Maryland and the United States and the decision in Stencil. I think they are very different. If we assume that the Supreme Court in Stencil was dealing with an active duty serviceman-- and I think we have to assume that in view of Justice Marshall's comment in dissent, namely, if someone put an aircraft into a civilian's house, that civilian would have a clear cause of action under the Federal Tort Claims Act.

If that person, that pilot, was a National Guardsman, that's just not true.

So I have to assume in reading that that the Court thought they were dealing with an active duty serviceman, or somebody similar to that who was under Federal control, a Federal technician, employee or--.

THE COURT: (Interposing) Don't you have to assume that they knew the facts that were set fourth in the lower court decision and the memoranda and so on on summary judgment?

MR. SWEENEY: Yes, I assume they do, but having spoken to counsel for Stencil, those facts may not have been clear when it went up on appeal, and I don't think the footnote describing the status of Captain Donnan in that decision was clear.

They referred to him as being assigned for training to the National Guard in Missouri, and I think that could possibly mean he was in some other Federal status where he was under Federal control.

This is not just a fine point, Your Honor. The distinction is very clear to anyone who has been in the military. If you are an on-duty, active duty serviceman, or if you are a reservist, you are under Federal control, and as this Court has held before, National Guardsmen are state employees under state control.

There is a Virginia statute, in fact, which subjects them to the laws of the Commonwealth of Virginia when they are not on active Federal service.

THE COURT: All right, sir.

MR. SWEENEY: I think in essence, Your Honor, that's our argument today on the merits of the motion. We don't feel the government can have it both ways.

We don't feel they can be protected as in Maryland from specified civilians and at the same time cloak themselves in the guise of a special Federal relationship when we are talking about state employees, National Guardsmen.

THE COURT: Well, hasn't the very same happened here, civil proceedings beneficiary, that in Stencil the Court found to be persuasive in determining there ought not to be allowed a suit by--of course, Donnan was injured, not killed, but the beneficiaries of the decedents state in our case, that is the Henry family, if receiving governmental benefits, as was done under Title 32, so wasn't that a consideration that the Court--it wasn't the sole basis upon which it relied, but it was a factor in making the determination that allowing to be done indirectly what couldn't be done directly was something they were not going to allow.

MR. SWEENEY: It is true, Your Honor, that Captain Donnan and the plaintiffs in this case, their survivors, are receiving Federal compensation benefits, but we feel that the Federal compensation scheme, which is, in order, the second rationale advanced by the Court in Stencil, is the least important matter, as Justice Marshall points out in his dissent, and really contradicts other Supreme Court holdings in the Warehouse and Travelers case.

THE COURT: To rely on the dissent for that is not really--that's an academic sort of a discussion, isn't it?

MR. SWEENEY: I agree, Your Honor, but I am simply advancing the proposition that the existence of a Federal benefit structure is the least important of those rationales.

THE COURT: But it is a rationale?

MR. SWEENEY: It is, sir. But I feel the central rationale in both Ferries and the Stencil decision is the supposed special Federal relationship. I think they call it a unique relationship, and we are claiming that that in no way exists here, because we are dealing with plaintiffs who are National Guardsmen under state control, and this is a third party action, and those two things taken together, we don't understand how the government can assert this unique Federal relationship.

That's the whole basis of our motion in reliance upon the decision in Maryland versus The United States.

THE COURT: All right, sir. Does any other counsel at this table want to be heard?

I think the motion for reconsideration is well taken. I cannot distinguish this case, particularly in view of the affadavit submitted by the government in the matter, which seems to me to put these plaintiffs in a parallel situation with Donnan.

But even without those, the distinction that Bell Textron seeks to make between the type of duty on which the National Guardsmen were engaged is not a distinction that I believe distinguishes the case from Stencil.

I think the case is governed by Stencil. I think pursuant to it, the government's motion is well taken, and the motion of the third party defendant, The United States, to dismiss, upon reconsideration, is granted.

Will you prepare an order on that?

MR. KING: Yes, Your Honor.

MR. SWEENEY: Your Honor, I think the other motion is still pending for discovery in this case. He agreed, even if he prevailed on the Ferries motion, he would produce for us the documents as requested.

THE COURT: So the discovery part of it has been resolved?

MR. KING: That is correct, Your Honor. I do not have all the documents in hand at this time. I have agreed that we will produce all documents which are available.

THE COURT: Technically, since you are not a party any longer, the motion to compel is not appropriate, but you have agreed to furnish them--.

MR. KING: (Interposing) I have agreed to furnish them. I have requested them, and they should be in the mail, hopefully, today.

THE COURT: Is that a satisfactory resolution of the discovery motion?

MR. SWEENEY: Yes, sir. If we could have some order on the record, or perhaps a stipulation from the United States on the record to protect ourselves against the discovery deadline.

THE COURT: By what time will you get them?

MR KING: Your Honor, I wish I could say by what time. I know that many of the documents are in the mail. I am not sure that all of the documents have been found at this time.

I would include in the order that the governments prepares for the Court dismissing the case that the government will produce these documents.

Unfortunately, I just cannot say within any time limit at this period of time. I have no idea.

THE COURT: That leaves the defendant in a right awkward position.

MR. SWEENEY: Could we stipulate a date, Your Honor, and then Mr. King could explain for us when that time runs out, what position he is in?

THE COURT: Ten days?

MR. KING: Very well, Your Honor.

THE COURT: From today.

MR. KING: Thank you.

THE COURT: Since I did rely to some extent on the affadavit submitted with your supplemental submission, the ruling on the matter is the granting of a motion for summary judgement rather than a motion to dismiss, and if you will make that clear in your order.

MR. MCDOLE: May it please the Court, my name is McDole, Mr. Silverman's partner.

There is one other discovery matter that is still open.

I know that the cut-off date for discovery is August 10th, and there appears to be either three or four more government employees to be deposed. Now that they are non-parties, they may well be outside of the subpoena power of this court.

I wonder if counsel for the government will also stipulate we can get those depostions under the same subpoenas?

MR. KING: That is agreed, Your Honor.

THE COURT: Now he is out of the case he is in a delightful mood and will probably agree to most anything while you have got him here.

MR. KING: That is correct, Your Honor.

THE COURT: Does that satisfy your request on discovery?

MR. MCDOLE: I'm sure it won't Mr. Silverman, Your Honor, but I will try to convince him it's acceptable.

(Whereupon, the hearing in the above-captioned matter was concluded.)

CERTIFICATE OF REPORTER

COMMONWEALTH OF VIRGINIA
COUNTY OF FAIRFAX

I, CAROLE J. BODEN, being a Shorthand Reporter, do hereby certify that I was authorized to and did report in shorthand the above-and-foregoing proceedings, and that my shorthand notes were reduced to typewriting under my supervision, and I further certify that the pages numbered 2 through 13, inclusive, contain a true and correct transcription of my shorthand notes taken therein.

Done and signed this day of , 1977, in the County of Fairfax, Commonwealth of Virginia.

Carole J. Boden, Court Reporter

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

NADIA B. HENRY, Administratrix With the Will Annexed of the Estate of JAMES HOWARD HENRY, Deceased, -and- ELMER W. RAMSEY, Administrator of the Estate of PHILIP R. RAMSAY, Deceased, *Plaintiffs,* -against- TEXTRON, INC., BELL HELICOPTER TEXTRON, a division of Textron, Inc. *Defendant and Third-Party Plaintiff,* -against- *Third-Party Defendant.*	**Civil Action Nos.** **76-920-A** **76-921-A**

ORDER

This cause came to be heard upon the Motion to Dismiss filed on behalf of the United States of America, and upon consideration of the memoranda and affidavits filed in support and in opposition thereto, and oral argument thereon, the Court being of the opinion that the motion should be granted in light of the recent Supreme Court decision in *Stencel Aero Engineering* v. *United States,* 45 U.S.L.W. 4598 (U.S. June 9, 1977), and that the Third-Party Complaint filed by Trextron, Inc. against the United States of America should be dismissed, and being of the further opinion that a final judgment should be entered from which an appeal will lie, there being no just reason for delay,

IT IS ORDERED, ADJUDGED AND DECREED, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, that there is no just reason for delay, and that entry of the aforesaid final judgment should be, and it is hereby, expressly directed; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the third-party complaint be, and it hereby is, dismissed, and a summary judgment granted, as against third-party complainants and in favor of third-party defendants; and

IT IS FURTHER ORDERED, that the third-party defendant, the United States of America, shall produce for inspection and copying the documents requested by defendant and third-party plaintiff Bell Textron in its motion to compel production filed on July 12, 1977, not later than August 1, 1977, and shall produce the documents and witnesses requested by plaintiffs' counsel.

7/25/1977.

United States District Judge

I ask for this:

ROBERT W. KING

Robert W. King
Counsel for the United States of America

Seen and consented to:

CARROLL E. DUBUC

Carroll E. Dubuc
Counsel for Trextron, Inc.

PHILIP SILVERMAN

Philip Silverman
Counsel for Plaintiffs Nadia B. Henry and Elmer W. Ramsay

UNITED STATES CONSTITUTION

Article I

SECTION 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish a uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article II

SECTION 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint

Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

ELEVENTH AMENDMENT

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

UNITED STATES CODE

TITLE 10

§ 3077. Army National Guard of United States: composition

The Army National Guard of the United States is the reserve component of the Army that consists of—

(1) federally recognized units and organizations of the Army National Guard; and

(2) members of the Army National Guard who are also Reserves of the Army. Aug. 10, 1956, c. 1041, 70A Stat. 170.

§ 3078. Army National Guard: when a component of Army

The Army National Guard while in the service of the United States is a component of the Army. Aug. 10, 1956, c. 1041, 70A Stat. 171.

§ 3079. Army National Guard of United States: status when not in Federal service

When not on active duty, members of the Army National Guard of the United States shall be administered, armed, equipped, and trained in their status as members of the Army National Guard. Aug. 10, 1956, c. 1041, 70A Stat. 171.

TITLE 28

§ 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions

on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jursidiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jursidiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 7426 or section 7428 (in the case of the United States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1954.

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

§ 2674 Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries

resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof. June 25, 1948, c. 646, 62 Stat. 983.

§ 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Repealed. Sept. 26, 1950, c. 1049, § 13(5), 64 Stat. 1043.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

TITLE 32

§ 109. Maintenance of other troops

(a) In time of peace, a State or Territory, Puerto Rico, the Virgin Islands, the Canal Zone, or the District of Columbia may maintain no troops other than those of its National Guard and defense forces authorized by subsection (c).

(b) Nothing in this title limits the right of a State or Territory, Puerto Rico, the Virgin Islands, the Canal Zone, or the District of Columbia to use its National Guard or its defense forces authorized by subsection (c) within its borders in time of peace, or prevents it from organizing and maintaining police or constabulary.

(c) In addition to its National Guard, if any, a State or Territory, Puerto Rico, the Virgin Islands, the Canal Zone, or

the District of Columbia may, as provided by its laws, organize and maintain defense forces. A defense force established under this section may be used within the jurisdiction concerned, as its chief executive (or commanding general in the case of the District of Columbia) considers necessary, but it may not be called, ordered, or drafted into the armed forces.

(d) A member of a defense force established under subsection (c) is not, because of that membership, exempt from service in the armed forces, nor is he entitled to pay, allowances, subsistence, transportation, or medical care or treatment, from funds of the United States.

(e) A person may not become a member of a defense force established under subsection (c) if he is a member of a reserve component of the armed forces. Aug. 10, 1956, c. 1041, 70A Stat. 600; Sept. 2, 1958, Pub.L. 85-861, § 2(2), 72 Stat. 1542.

§ 709 Caretakers and clerks

(a) Under such regulations as the Secretary of the Army may prescribe, funds allotted by him for the Army National Guard may be spent for the compensation of competent persons to care for material, armament, and equipment of the Army National Guard. Under such regulations as the Secretary of the Air Force may prescribe, funds allotted by him for the Air National Guard may be spent for the compensation of competent persons to care for material, armament, and equipment of the Air National Guard. A care-taker employed under this subsection may also perform clerical duties incidental to his employment and other duties that do not interfere with the performance of his duties as caretaker.

(b) Enlisted members of the National Guard and civilians may be employed as caretakers under this section. However, if a unit has more than one caretaker, one of them must be an enlisted member. Compensation under this section is in additon to compensation otherwise provided for a member of the National Guard.

(c) Under regulations to be prescribed by the Secretary concerned, material, armament, and equipment of the Army National Guard or Air National Guard of a State or Territory, Puerto Rico, the Canal Zone, or the District of Columbia may be placed in a common pool for care, maintenance, and storage. Not more than 15 caretakers may be employed for each of those pools.

(d) Under regulations to be prescribed by the Secretary concerned, one commissioned officer of the National Guard in a grade below major may be employed for each pool set up under subsection (c) and for each squadron of the Air National Guard. Commissioned officers may not be otherwise employed under this section.

(e) Funds appropriated by Congress for the National Guard are in addition to funds appropriated by the several States and Territories, Puerto Rico, the Canal Zone, and the District of Columbia for the National Guard, and are available for the hire of caretakers and clerks.

(f) The Secretary concerned shall fix the salaries of clerks and caretakers authorized to be employed under this section, and shall designate the person to employ them. Aug. 10, 1956, c. 1041, 70A Stat. 614.

VIRGINIA CODE

§ **44-40.1. Persons subject to the Virginia military laws**—All members of the Virginia national guard are subject to the military laws of Virginia when under orders to be present for duty, not in federal service. (1976, c. 399.)

32 CODE OF FEDERAL REGULATIONS

§ **7-302.22** *Insurance—Liability to Third Persons.*

Insurance—Liability To Third Persons (1966 Dec)

(a) The Contractor shall procure and thereafter maintain workmen's compensation, employee's liability, comprehensive general liability (bodily injury) and comprehensive automobile liability (bodily injury and property damage) insurance, with respect to performance under this contract, and such other insurance as . . .* may from time to time require with respect to performacne under this contract; *provided,* that the Contractor may with the approval of . . .* maintain a self-insurance program, and *provided further,* that with respect to workmen's compensation the Contractor is qualified pursuant to statutory authority. All insurance required pursuant to the provisions of this paragraph shall be in such form, in such amounts, and for such periods of time, as . . .* may from time to time require or approve, and with insurers approved by . . .*. *(See text at end of clause.)*

(b) The Contractor agrees, to the extent and in the manner required by . . .*, to submit for the approval for . . .* any other insurance maintained by the Contractor in connection with the performance of this contract and for which the Contractor seeks reimbursement hereunder. *(See text at end of clause.)*

(c) The Contractor shall be reimbursed: (i) for the portion allocable to this contract of the reasonable cost of insurance as required or approved pursuant to the provisions of this clause, and (ii) without regard to and as an an exception to the "Limitation of Cost" or the "Limitation of Funds" clause of this contract, for liabilities to third persons for loss of or damage to property (other than property (A) owned, occupied or used by the Contractor or rented to the Contractor, or (B) in the care, custody, or control of the Contractor), or for death or bodily injury, not compensated by insurance or otherwise, arising out of the performance of this contract, whether or not caused by the negligence of the Contractor, his agents, servants or employees, *provided* such liabilities are represented by final judgments or settlements approved in writing by the Government, and expenses incidental to such liabilities, except liabilities (I) for which the Contractor is otherwise responsible under the express terms of the clause or clauses, if any, specified in the Schedule, or (II) with respect to which the Contract has failed

to insure as required or maintain insurance as approved by . . .* *See text at end of clause.)* or (III) which results from willful misconduct or lack of good faith on the part of any of the Contractor's directors or officers, or on the part of any of his managers, superintendents, or other equivalent representative, who has supervision or direction of (1) all or substantially all of the Contractor's business, or (2) all or substantially all of the Contractor's operation at any one plant or separate location in which this contract is being performed, or (3) a separate and complete major industrial operation in connection with the perforamnce of this contract. The foregoing shall not restrict the right of the Contractor to be reimbursed for the cost of insurance maintained by the Contractor in connection with the performance of this contract, other than insurance required to be submitted for approval or required to be procured and maintained pursuant to the provisions of this clause, *provided* such cost would constitute Allowable Cost under the clause of this contract entitled "Allowable Cost, Fixed Fee and Payment".

(d) The Contractor shall give the Government or its representatives immediate notice of any suit or action filed, or prompt notice of any claim made, against the Contractor arising out of the performance of this contract, the cost and expense of which may be reimbursable to the Contractor under the provisions of this contract and the risk of which is then uninsured or in whch the amount claimed exceeds the amount of coverage. The Contractor shall furnish immediately to the Government copies of all pertinent papers received by the Contractor. If the amount of the liability claimed exceeds the amount of coverage, the Contractor shall authorize representatives of the Government to collaborate with counsel for the insurance carrier, if any, in setting or defending such claim. If the liability is not insured or covered by bond, the Contractor shall, if required by the Government, authorize representatives of the Government to settle or defend any such claim and to represent the Contractor in or take charge of any litigation in connection therewith; *provided,* however, that the Contractor

may, at his own expense, be associated with the representatives of the Government in the settlement or defense of any such claim or litigation.

§ **7-204.21** *Flight Risks.* In accordance with 10-504, insert the following clause.

FLIGHT RISKS (1975 OCT)

(a) Notwithstanding any other provision of this contract, and particularly subparagraph (g)(1) of the "Government Property" clause and paragraph(c) of the "Insurance -Liability to Third Persons" clause, the Contractor shall not (i) be relieved of liability for, damage to, or loss or destruction of, aircraft sustained during flight, or (ii) be reimbursed for liabilities to third persons for loss of or damage to property, or for death or bodily injury, which are caused by aircraft during flight, unless the flight crew members have previously been approved in writing by . . . . *
(See footnote at end of clause.)

(b) For purposes of this clause:

(i) Unless otherwise specifically provided in the Schedule, the term "aircraft" means any aircraft, whether furnished by the Contractor under this contract (either before or after acceptance by the Government) or furnished by the Government to the Contractor under this contract, including all Government Property placed or installed therein or attached thereto; *provided,* however, that such aircraft and property are not covered by a separate bailment agreement.

(ii) The term "flight" means any flight demonstration flight test, taxi test, or other flight, made in the performance of this contract, or for the purpose of safeguarding the aircraft, or previously approved in writing by the . . . * (*See footnote at end of clause.*) As to land based aircraft, "flight" shall commence with the taxi roll from a flight line

and continue until the aircraft has completed the taxi roll to a flight line; as to sea planes, "flight" shall commence with the launching from a ramp and continue until the aircraft has completed its landing run and is beached at a ramp; as to helicopters, "flight" shall commence upon engagement of the rotors for the purpose of take-off and continue until the aircraft has returned to the ground and rotors are disengaged; and for vertical take-off aircraft, "flight" shall commence upon disengagement from any launching platform or device and continue until the aircraft has been re-engaged to any launching platform or device.

(iii) The term "flight crew members" means the pilot, the co-pilot and, unless otherwise specifically provided in the Schedule, the flight engineer, navigator, bombardier-navigator, and defense systems operator, when required, or assigned to their respective crew positions, to conduct any flight on behalf of the Contractor.

(c) If any aircraft is damaged, lost, or destroyed during flight, and if the amount of such damage, loss, or destruction exceeds one hundred thousand dollars ($100,000) or twenty percent (20%) of the estimated cost (exclusive of any fee) of this contract, whichever is less, and if the Contractor is not liable for the damage, loss or destruction pursuant to the "Government Property" clause of this contract together with paragraph (a) above, then an equitable adjustment for any resulting repair, restoration, or replacement that is required under this contract shall be made (i) in the estimated cost, delivery schedule, or both, and (ii) in the amount of any fee to be paid to the Contractor, and the contract shall be modified in writing accordingly; *provided,* in determining the amount of adjustment in the fee that is equitable, any fault of the Contractor, his employees, or any subcontractor, which materially contributed to the damage, loss, or destruction shall be taken into consideration. Failure to agree on any adjustment shall be a dispute concerning a question of fact within the meaning of the "Disputes" clause of this contract.

§ 10-404 Aircraft—Ground and Flight Risk.

(a) Negotiated fixed-price type contracts for the production, modification, maintenance, or overhaul of aircraft shall, except as provided in (b) below, include the clause in 7-104.10.

(b)(1) In paragraph (b) of the clause in 7-104.10, certain of the defined terms may be modified by insertion of appropriate additional definitions in the contract in accordance with the following. The purpose of the clause is to have the Government assume risks which generally entail unusually high insurance premiums and which are not covered by the contractor's "contents," "work-in-process," or other similar insurance. It is recognized that all of the definitions prescribed in the clause may not cover all situations which should be covered if the above purpose is to be accomplished. Therefore, changes may be effected in the contract as set forth below.

(i) Since the standard definition of "*aircraft*" contemplates conventional types of winged aircraft, a modified definition is necessary if the contract covers helicopters, vertical take-off aircraft, lighter-than-air airships or other nonconventional types of aircraft. The modified definition should take into consideration that the aircraft has reached a point of manufacture comparable to that required in the standard definition;

(ii) The definition of "*in the open*" may be modified to include "hush houses," test hangers, and comparable structures, and other designated areas;

(iii) "*Contractor's premises*" shall be expressly defined and shall be limited to those locations where aircraft, as defined in the clause, may be located during and for the performance of the contract. "*Contractor's premises*" may include, but are not limited to, premises owned or leased by the contractor or premises as to which the contractor has a permit, license, or other right of use either exclusively or jointly with others, including Government airfields.

(2) The Government need not assume the risk of damage to, or loss or destruction of, aircraft, as provided by the clause, if the best estimate of premium costs which would be included in the contract price for insurance coverage for such damage, loss, or destruction at any plant or facility is less than $500. The Government shall not assume such risks if the aircraft is being acquired in connection with a Foreign Military Sale and the foreign government involved has not agreed to assume such risks. If it is determined not to assume such risks, the clause shall not be made a part of the contract, and the cost of necessary insurance to be obtained by the contractor to cover such risks shall be considered in establishing the contract price. In such cases, however, if performance of the contract is expected to involve the flight of Government-furnished aircraft, the substance of the Flight Risks clause in 7-204.21, suitably adapted for use in a fixed-price type contract, shall be used.

(3) Subparagraph (d)(iii) of the clause in 7-104.10 may be varied to provide for Government assumption of risk of transportation by conveyance on streets or highways where the contracting officer determines that such transportation is limited to the vicinity of the contractor's premises and is merely an incident to work being performed under the contract.

§ 564.52 Statutory authority.

(b) In accordance with general principles of law, the National Guard and the Air National Guard when not in Federal service are not agencies of the United States, and the United States is not liable for injury or damage arising from their activities. Thus, claims for such injury or damage are not cognizable under the Federal Tort Claims Act, as revised and codified (62 Stat. 982, 28 U.S.C. 3671-80). By the statutory provisions referred to in paragraph (a) of this section, the United States assumes an obligation to settle administratively limited classes of claims relating to activities of the National Guard and the Air National Guard.

STENCEL AERO ENGINEERING CORPORATION,
Petitioner,

v.

UNITED STATES

—US—, 52 L Ed 2d 665, 97 S Ct—

[No. 76-321]

Argued March 22, 1977. Decided June 9, 1977.

Mr. Chief Justice Burger delivered the opinion of the Court.

We granted certiorari in this case to decide whether the United States is liable under the Federal Tort Claims Act, 28 USC § 2674 [28 USCS § 2674], to indemnify a third party for damages paid by it to a member of the Armed Forces injured in the course of military service.

(1)

On June 9, 1973, Captain John Donham was permanently injured when the egress life-support system of his F-100 fighter aircraft malfunctioned during a mid-air emergency.[1] Petitioner, Stencel Aero Engineering Corp., manufactured the ejection system pursuant to the specifications of, and by use of certain components provided by, the United States.[2] Pursuant to the Veterans' Benefits Act, 38 USC §§ 321 et seq. [38 USCS §§ 321 et seq.], made applicable to National Guardsmen by 32 USC § 318 [32 USCS § 318], Captain Donham was awarded a life-

[1] Captain Donham was at the time assigned for training to the 131st Tactical Fighter Group, Missouri National Guard.

[2] There is no contractual relationship between the United States and Stencel. Stencel contracted with North American Rockwell, the prime government contractor, to provide the F-100's pilot eject system.

time pension of approximately $1,500 per month. He nonetheless brought suit for the injury in the Eastern District of Missouri claiming damages of $2,500,000. Named as defendants, inter alia, were the United States and Stencel. Donham alleged that the emergency eject system malfunctioned as a result of "the negligence and carelessness of the defendants individually and jointly."

Stencel then cross-claimed against the United States for indemnity, charging that any malfunction in the egress life-support system used by Donham was due to faulty specifications, requirements, and components provided by the United States or other persons under contract with the United States. The cross-claim further charged that the malfunctioning system had been in the exclusive custody and control of the United States since the time of its manufacture. Stencel therefore claimed that, insofar as it was neligent at all, its negligence was passive, while the negligence of the United States was active. Accordingly it prayed for indemnity as to any sums it would be required to pay to Captain Donham.[3]

The United States moved for summary judgment against Donham, contending that he could not recover under the Tort Claims Act against the Government for injuries sustained incident to military service. *Feres* v. *United States*, 340 US 135, 95 L Ed 152, 71 S Ct 153 (1950). The United States further moved for dismissal of Stencel's cross-claim, asserting that Feres also bars an indemnity action by a third party for monies paid to military personnel who could not recover directly from the United States.

The District Court granted the Government's motions, holding that Feres protected the United States both from the

[3] Stencel's indemnity claim is based upon the law of Missouri. See, e. g., *Feinstein* v. *Edmond Livingston & Sons, Inc.* 457 SW2d 789, 792-793 (Mo. 1970); *Kansas City Southern Ry.* v. *Payway Feed Mills, Inc.* 338 SW2d 1 (Mo 1960). The FECA, of course, insofar as it is applicable, fixes the liability of the United States with reference to "the law of the place where the [wrongful] act or omission occurred." 28 USC §1346(b)[28 USCS § 1346(b)].

claims of the serviceman and that of the third party.[4] Both claims were therefore dismissed for lack of subject matter jurisdiction. Stencel appealed this ruling to the Court of Appeals for the Eighth Circuit[5] and that court affirmed 536 F2d 765. We granted certiorari.[6] 429 US 958, 50 L Ed 2d 325, 97 S Ct 380.

(2)

In Feres v United States, supra, the Court held that an on-duty serviceman who is injured due to the negligence of Government officials may not recover against the United States under the Federal Tort Claims Act. During the same Term, in a case involving injuries to private parties, the Court also held that the Act permits impleading the Government as a third-party defendant, under a theory of indemnity or contribution, if the original defendant claims that the United States was wholly or partially responsible for the plaintiff's injury. United States v Yellow Cab Co. 340 US 543, 95 L Ed 523, 71 S Ct 399 (1951). In this case we must resolve the tension between Feres and Yellow Cab when a member of the armed services brings a tort action against a private defendant and the latter seeks in-

[4] Still pending in the District Court is Donham's action against Stencel and against Mills Manufacturing Corporation, another alleged tortfeasor.

[5] The District Court had properly certified its judgment as final pursuant to Fed Rule Civ Proc 54 (b), thereby making immediate appeal by Stencel appropriate.

[6] The circuits have been far from uniform in their treatment of this issue. The view taken by the Eighth Circuit in this case was first adopted by the Ninth Circuit in *United Air Lines, Inc.* v. *Wiener*, 335 F2d 379, 404, cert dismissed, 379 US 951, 13 L Ed 2d 549, 85 S Ct 452 (1964), and has been recently reaffirmed in *Adams* v. *General Dynamics Corp.* 535 F2d 489, 491 (1976), petn for cert filed, 45 USLW 3184. Positions which appear inconsistent with this view have been adopted by the Tenth Circuit in *Barr* v. *United States*, 464 F2d 1141, 1143-1144 (1972), cert denied, 409 US 1125, 35 L Ed 2d 256, 93 S Ct 937 (1973), and by the Fifth Circuit in *Certain Underwriters at Lloyd's* v. *United States*, 511 F2d 159, 163 (1975).

demnity from the United States under the Tort Claims Act, claiming that government officials were primarily responsible for the injuries.

Petitioner argues that "[t]he Federal Tort Claims Act waives the Government's immunity from suit in sweeping language." United States v Yellow Cab Co., supra, at 547, 95 L Ed 523, 71 S. Ct 399. Petitioner therefore contends that, unless its claim falls within one of the express exceptions to the Act, the Court should give effect to the congressional policy underlying the Act, which is to hold the United States liable under state law principles to the same extent as a similarly situated private individual. However, the principles of Yellow Cab here come into conflict with the equally well-established doctrine of Feres v United States. It is necessary, therefore, to examine the rationale of Feres to determine to what extent, if any, allowance of petitioner's claim would circumvent the purposes of the Act as there construed by the Court.

Feres was an action by the executrix of a serviceman who had been killed when the barracks in which he was sleeping caught fire. The plaintiff claimed that the United States had been negligent in quartering the decedent in barracks it knew to be unsafe due to a defective heating plant.[7] While recognizing the broad congressional purpose in passing the Act, the Court noted that the relationship between a sovereign and the members of its armed forces is unlike any relationship between private individuals. 340 US, at 141-142, 95 L Ed 152, 71 S Ct 153. There is thus at least a surface anomaly in applying the mandate of the Act that "[t]he United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances . . . ." 28 USC §2674 [28 USCS §2674]. Noting that the effect of the Act was "to waive

[7] The Court considered two additional cases involving alleged negligence of army officials. *Jefferson* v. *United States*, 340 US 135, 95 L Ed 152, 71 S Ct 153, and *United States* v. *Griggs*, 340 US 135, 95 L Ed 152, 71 S Ct 153. It is unnecessary, for present purposes, to detail the fact situations involved in these two cases.

immunity from the recognized causes of action and . . . not to visit the Government with novel and unprecedented liabilities," id., at 142, 95 L Ed 152, 71 S Ct 153, the Court concluded that,

> "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service. Without exception, the relationship of military personnel to the Government has been governed exclusively by federal law. We do not think that Congress, in drafting this Act, created a new cause of action dependent on local law for service-connected injuries or death due to negligence. We cannot impute to Congress such a radical departure from established law in the absence of express congressional command." Id., at 146, 95 L Ed 152, 71 S Ct 153.

In reaching this conclusion, the Court considered several factors: first, the relationship between the Government and members of its Armed Forces is "distinctively federal in character," citing United States v Standard Oil Co. 332 US 301, 91 LEd 2067, 67 S Ct 1604; it would make little sense to have the Government's liability to members of the armed services dependent on the fortuity of where the soldier happened to be stationed at the time of the injury. Second, the Veterans' Benefits Act establishes, as a substitute for tort liability, a statutory "no-fault" compensation scheme which provides generous pensions to injured servicemen, without regard to any negligence attributable to the Government. A third factor was explicated in United States v Brown, 348 US 110,112,99 L Ed 139, 75 S Ct 141 (1954) namely, "[t]he peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty . . . ." We must therefore consider the impact of these factors where, as here, the suit against the

Government is not brought by the serviceman himself, but by a third party seeking indemnity for any damages it may be required to pay the serviceman.

Clearly, the first factor considered in Feres operates with equal force in this case. The relationship between the Government and its suppliers of ordnance is certainly no less "distinctively federal in character" than the relationship between the Government and its soldiers. The armed services perform a unique, nationwide function in protecting the security of the United States. To that end military authorities frequently move large numbers of men, and large quantities of equipment, from one end of the continent to the other, and beyond. Significant risk of accidents and injuries attend such a vast undertaking. If, as the Court held in Feres, it makes no sense to permit the fortuity of the situs of the alleged negligence to affect the liability of the Government to a serviceman who sustains service-connected injuries, 340 US, at 143, 95 L Ed 152, 71 S Ct 153, it makes equally little sense to permit that situs to affect the Government's liability to a Government contractor for the identical injury.

The second factor considered by Feres is somewhat more difficult to apply. Petitioner argues that the existence of a generous military compensation scheme (from which Captain Donham has and will continue to benefit, ante, p , 52 L Ed 2d 668) is of little comfort to it. It is contended that, although it may be fair to prohibit direct recovery by servicemen under the Act, since they are assured of compensation regardless of fault under the Veterans' Benefits Act, petitioner as a third-party claimant should not be barred from indemnity for damages which it may be required to pay to the serviceman, and as to which it has no alternative federal remedy.

A compensation scheme such as the Veterans' Benefits Act serves a dual purpose: it not only provides a swift, efficient remedy for the injured serviceman, but it also clothes the Government in the "protective mantle of the Act's limitation-of-liability provisions." See Cooper Stevedoring Co. v Kopke,

Inc. 417 US 106, 115, 40 L Ed 2d 694, 94 S Ct 2174 (1974). Given the broad exposure of the Government, and the great variability in the potentially applicable tort law, see Feres, 340 US, at 142-143, 95 L Ed 152, 71 S Ct 153, the military compensation scheme provides an upper limit of liability for the Government as to service-connected injuries. To permit petitioner's claim would circumvent this limitation, thereby frustrating one of the essential features of the Veterans' Benefits Act. As we stated in a somewhat different context concerning the Tort Claims Act: "To permit [petitioner] to proceed . . . here would be to judicially admit at the back door that which has been legislatively turned away at the front door. We do not believe that the [Federal Tort Claims] Act permits such a result." Laird v Nelms, 406 US 797, 802, 32 L Ed 2d 499, 92 S Ct 1899 (1972).

Turning to the third factor, it seems quite clear that where the case concerns an injury sustained by a soldier while on duty, the effect of the action upon military discipline is identical whether the suit is brought by the soldier directly or by a third party. The litigation would take virtually the identical form in either case, and at issue would be the degree of fault, if any, on the part of the Government's agents and the effect upon the serviceman's safety. The trial would, in either case, involve second-guessing military orders, and would often require members of the armed services to testify in court as to each other's decisions and actions. This factor, too, weighs against permitting any recovery by petitioner against the United States.

We conclude, therefore, that the third party indemnity action in this case is unavailable for essentially the same reasons that the direct action by Donham is barred by Feres. The factors considered by the Feres court are largely applicable in this type of case as well; hence, the right of a third party to recover in an indemnity action against the United States recognized in Yellow Cab, supra, must be held limited by the rationale of Feres where the injured party is a serviceman.

Since the relationship between the United States and petitioner is based on a commercial contract, there is no basis for a claim of unfairness in this result.[8]

Accordingly, the judgment of the Court of Appeals is affirmed.

Mr. Justice Marshall, with whom Mr. Justice Brennan joins, dissenting.

The opinion of the Court appears to be premised on the theory that in any case involving a member of the military on active duty, Feres v United States, 340 US 135, 95 L Ed 152, 71 S Ct 153 (1950), displaces the plain language of the Tort Claims Act: I cannot agree that that narrow, judicially created exception to the waiver of sovereign immunity contained in the Act should be extended to any category of litigation other than suits against the Government by active duty servicemen based on injuries incurred while on duty.

Even if Feres is not to be strictly limited, I do not agree that its extension to cover this case is justified. The Court's explanation simply does not differentiate this suit by a corporation against the Government from similar suits that the Tort Claims Act does allow. See, e. g., United States v Yellow Cab Co. 340 US 543, 95 L Ed 523, 71 S Ct 399(1951).

The first factor relied upon by the Court is the "distinctively federal" relationship between the Government and "its suppliers of ordnance." Ante, at , 52 L Ed 2d 670. It is true, of course, that the military performs "a unique, nationwide function," ibid., but so do the Bureau of the Census, the Immigration and Naturalization Service, and many other agencies of the Federal Government. These agencies, like the military, may have personnel and equipment in all parts of the country. Nevertheless, Congress has made private rights

[8] Since the first Circuit case to hold such actions barred by Feres was decided in 1964, see n 5; supra, petitioner no doubt had sufficient notice so as to take this risk into account in negotiating its contract for the emergency eject system at issue here.

against the Government depend on "the law of the place where the act or omission occurred," 28 USC § 1346(b) [28 USCS §1346(b)] and presumably the Court agrees that this provision governs the rights of suppliers to non-military agencies. Nothing in the Court's opinion explains why it concludes that the relationship between the Government and those suppliers differs from its relationship to purveyors of military equipment.

The Court also concludes that compensation payments to an injured serviceman under the Veterans' Benefits Act, 38 USC §§321 et seq. [38 USCS §§321 et seq.], place an absolute upper limit on the Government's liability for service-connected injuries. Yet, nothing in that Act suggests that it is designed to place on third parties, such as petitioner, the burden of fully compensating injuries to servicemen when the Government is at fault. Indeed, the Veterans' Benefits Act does not even contain an explicit declaration that it is the exclusive remedy against the Government for a serviceman's injury. The comparable compensation program for civilian employees of the Government does contain such a limitation of liability. 5 USC §8116(c)[5 USCS §8116(c)].* Yet we have held that the broad language of the exclusivity provision in the civilian compensation scheme does not affect "the rights of unrelated third parties," Weyerhaeuser S. S. Co. v United States, 372 US 597, 601, 10 L Ed 2d 1, 83 S Ct 926(1963), and the lower courts have allowed indemnity suits identical to petitioner's to proceed despite that provision. See, e. g., Travelers Insurance Co. v United States, 493 F2d 881(1974). The Court fails to explain why the

* The liability of the United States or an instrumentality thereof under this subchapter or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute. . . ."

absence of an exclusivity provision in the Veterans' Benefits Act forecloses suits by third parties in cases involving injuries to military personnel when the existence of such a clause does not bar similar actions when the injured employee works for one of the Government's civilian agencies.

Finally, the Court claims to find in this action a threat to military discipline. It is clear that the basis of Feres was the Court's concern with the disruption of "[t]he peculiar and special relationship of the soldier to his superiors" that might result if the soldier were allowed to hale his superiors into court. See United States v Brown, 348 US 110, 112, 99 L Ed 139, 75 S Ct 141 (1954). That problem does not arise when a non-military third party brings suit.

The majority's argument that whether petitioner or the injured serviceman sues is of no import because the trial would take the same form in either case proves far too much. Had the same malfunction in the pilot eject system that caused the serviceman's injuries here also caused that system to plunge into a civilian's house, the injured civilian would unquestionably have a cause of action under the Tort Claims Act against the Government. He might also sue petitioner, which might, as it has here, cross-claim against the Government. In that hypothethical case, as well as in the case before us, there would be the same chance that the trial would "invlove second-guessing military orders, and would . . require members of the armed services to testify in court as to each other's decisions and actions." Ante, at , 52 L Ed 2d 671. Yet there would be no basis, in Feres or in the Tort Claims Act, for concluding that the suit is barred because of the nature of the evidence to be produced at trial. There is no basis for reaching that conclusion here.

I respectfully dissent.

MARYLAND, FOR THE USE OF LEVIN, Et Al. v. UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 345. Argued March 15, 1965.—Decided May 3, 1965.

MR. JUSTICE HARLAN delivered the opinion of the Court.

The question we decide here is whether a civilian employee and military member of the National Guard is an "employee" of the United States for purposes of the Federal Tort Claims Act when his National Guard unit is not in active federal service.[1]

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[1] The Federal Tort Claims Act provides in pertinent part:

28 U.S.C. § 1346 (1958 ed.):

"(b) Subject to the provisions of chapter 171 of this title, the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office of employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

28 U.S.C. § 2671:

"As used in this chapter and sections 1346 (b) and 2401 (b) of this title, the term—

" 'Federal agency' includes the executive departments and independent establishment of the United States, and corporations primarily acting as, instrumentalities or agencies of the United States but does not include any contractor with the United States.

" 'Employee of the government' includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation."

28 U.S.C. § 2674:

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall no be liable for interest prior to judgment or for punitive damages."

Petitioners' decedents were passengers on a Capital Airlines plane that collided over Maryland with a jet trainer assigned to the Maryland Air National Guard. The only survivor of the accident was the pilot of the trainer, Captain McCoy, and it is not disputed that the collision was caused by his negligence. *The estates of the pilot and co-pilot of the Capital plane, and Capital Airlines itself, filed suit against the United States under the Federal Tort Claims Act in the District Court for the District of Columbia, and recovered judgments.* The Court of Appeals for the District of Columbia Circuit affirmed, *United States* v. *Maryland for the use of Meyer*, 116 U. S. App. D. C. 259, 322 F. 2d 1009, cert. denied, 375 U. S. 954, motion for leave to file petition for rehearing pending, No. 543, 1963 Term. Meanwhile, petitioners filed a similar suit in the Western District of Pennsylvania, and all parties agreed to proceed solely on the record made in the *Meyer* case. The District Court rendered judgment for petitioners, but the Court of Appeals for the Third Circuit reversed. 329 F. 2d 722. We granted certiorari, 379 U. S. 877, to resolve the conflict between the two Circuits on this single record, and, more broadly, to settle authoritatively the basic question stated at the outset of this opinion which is at the core of other litigation arising out of this same disaster, now pending in a number of courts in different parts of the country.[2]

Captain McCoy held a commission from the Governor of Maryland as an officer in the Maryland Air National Guard, and he served on alternate Saturdays as a fighter pilot and Squadron Maintenance Officer with the 104th Fighter Interceptor Squadron. During the rest of the month Captain McCoy was employed by the Guard in a civilian capacity as Aircraft Maintenance Chief under 32 U. S. C. §709 (1958 ed.), the so-

[2] We are informed that such litigation is pending in Illinois, Ohio, and New York.

called federal "caretaker" statute.[3] In his civilian capacity Captain McCoy supervised the maintenance of the squadron aircraft assigned to the Air National Guard but owned by the United States. On the day of the accident, Captain McCoy had

[3] National Defense Act of 1916, § 90, 39 Stat. 166, as amended, now 32 U.S.C. § 709 (1958 ed.):

"(a) Under such regulations as the Secretary of the Army may prescribe, funds allotted by him for the Army National Guard may be spent for the compensation of competent persons to care for material, armament, and equipment of the Army National Guard. Under such regulations as the Secretary of the Air Force may prescribe, funds allotted by him for the Air National Guard may be spent for the compensation of competent persons to care for material, armament, and equipment of the Air National Guard. A caretaker employed under this subsection may also perform clerical duties incidental to his employment and other duties that do not interfere with the performance of his duties as caretaker.

"(b) Enlisted members of the National Guard and civilians may be employed as caretakers under this section. However, if a unit has more than one caretaker, one of them must be an enlisted member. Compensation under this section is in addition to compensation otherwise provided for a member of the National Guard.

"(c) Under regulations to be prescribed by the Secretary concerned, material, armament, and equipment of the Army National Guard or Air National Guard of a State or Territory, Puerto Rico, the Canal Zone, or the District of Columbia may be placed in a common pool for care, maintenance, and storage. Not more than 15 caretakers may be employed for each of those pools.

"(d) Under regulations to be prescribed by the Secretary concerned, one commissioned officer of the National Guard in a grade below major may be employed for each pool set up under subsection (c) and for each squadron of the Air National Guard. Commissioned officers may not be otherwise employed under this section.

"(e) Funds appropriated by Congress for the National Guard are in addition to funds appropriated by the several States and Territories, Puerto Rico, the Canal Zone, and the District of Columbia for the National Guard, and are available for the hire of caretakers and clerks.

"(f) The Secretary concerned shall fix the salaries of clerks and caretakers authorized to be employed under this section, and shall designate the person to employ them."

obtained permission from his superior to take a passenger on a flight in order to interest the passenger in joining the Air National Guard. The principal factual dispute below was whether at the time of the accident Captain McCoy was performing his duties with the Guard in a military or civilian capacity. A line of cases in the courts of appeals beginning with *United States* v. *Holly*, 192 F. 2d 221 (C. A. 10th Cir., 1951), has held that civilian "caretakers" are employees of the United States for purposes of suit under the Federal Tort Claims Act.[4] Another line of cases has been equally consistent in treating military members of the Guard as employees of the States, not the Federal Government.[5] We do not deal with the factual question, on which the decision below turned,[6] since, in agreement with the views of Judge Smith[7] and in disagreement with the Court of Appeals in the *Meyer* case, we hold that in both capacities Captain McCoy was an employee of the State of Maryland, and not of the United States. Hence the United States cannot be held liable under the Tort Claims Act for his negligence in either capacity.

[4] *Elmo* v. *United States*, 197 F. 2d 230, (C.A. 5th Cir.); *United States* v. *Duncan*, 197 F.2d 233 (C.A. 5th Cir.); *Courtney* v. *United States*, 230 F.2d 112 (C.A. 2d Cir.); *United States* v. *Wendt*, 242 F.2d 854 (C.A. 9th Cir.).

[5] *Williams* v. *United States*, 189 F.2d 607(C.A. 10th Cir.); *Dover* v. *United States*, 192 F.2d 431 (C.A. 5th Cir.); *McCranie* v. *United States*, 199 F.2d 581 (C.A. 5th Cir.); *Storer Broadcasting Co.* v. *United States*, 251 F.2d 268 (C.A. 5th Cir.); *Bristow* v. *United States*, 309 F.2d 465 (C.A. 6th Cir.); *Pattno* v. *United States*, 311 F.2d 604 (C.A. 10th Cir.); *Blackwell* v. *United States*, 321 F.2d 96 (C.A. 5th Cir).

[6] A majority of the Court of Appeals held, contrary to the District Court, that McCoy was acting in his military capacity at the time of the accident.

[7] Of the other two members of the panel, Judge Hastie did not reach the question whether civilian Guard employees were embraced within the Tort Claims Act, and Judge Staley was in accord with the views of the District of Columbia Circuit in *Meyer*.

I

The National Guard is the modern Militia reserved to the States by Art. I. §8, cl. 15. 16, of the Constitution.[8] It has only been in recent years that the National Guard has been an organized force, capable of being assimilated with ease into the regular military establishment of the United States. From the days of the Minutemen of Lexington and Concord until just before World War I, the various militias embodied the concept of a citizen army, but lacked the equipment and training necessary for their use as an integral part of the reserve force of the United States Armed Forces.[9] The passage of the National Defense Act of 1916[10] materially altered the status of the militias by constituting them as the National Guard. Pursuant to power vested in Congress by the Constitution (see n.8), the Guard was to be uniformed, equipped, and trained in much the same way as the regular army, subject to federal standards and capable of being "federalized" by units, rather than by drafting individual soldiers.[11] In return, Congress authorized the allocation of federal equipment to the Guard, and provided federal compensation for members of the Guard, supplementing any state emoluments. The Governor, however, remained in charge of the National Guard in each State except when the Guard was called into active federal service; in most instances the Governor administered the Guard through the State Adjutant

[8] "The Congress shall have Power . . .

"To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

"To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress."

[9] See generally, Wiener, The Militia Clause of the Constitution, 54 Harv. L. Rev. 181 (1940).

[10] 39 Stat. 166 (1916).

[11] National Defense Act, § 111, now 10 U.S.C. § 672 (1964 ed.). See Wiener, *supra*, n. 9.

General,[12] who was required by the Act to report periodically to the National Guard Bureau, a federal organization, on the Guard's reserve status.[13] The basic structure of the 1916 Act has been preserved to the present day.

Section 90 of the National Defense Act authorized the payment of federal funds for the employment by the Guard of civilian "caretakers" to be responsible for the upkeep of federal equipment allocated to the National Guard.[14] This section was later amended to make explicit that employment as a caretaker could be held by officers in the Guard, who would receive a full-time salary as civilian caretakers, and in addition would receive compensation for service as military members of the Guard.[15] The legislative history of these amendments makes clear that the State Adjutant General could appoint officers of the Guard to serve as civilian caretakers, provided only that the appointees met the requirements established by the federal authorities.[16]

II

It is not argued here that military members of the Guard are federal employees, even though they are paid with federal funds and must conform to strict federal requirements in order

[12] See 32 U.S.C. § 314 (1958 ed.).

[13] National Defense Act, § 66, as amended, now 32 U.S.C. § 314(d) (1958 ed.).

[14] "Funds allotted by the Secretary of War for the support of the National Guard shall be available . . . for the compensation of competent help for the care of the material, animals, and equipment thereof, under such regulations as the Secretary of War may prescribe: *Provided*, That the men to be compensated, not to exceed five for each battery or troop, shall be duly enlisted therein and shall be detailed by the battery or troop commander, under such regulations as the Secretary of War may prescribe, and shall be paid by the United States disbursing officer in each State, Territory, and the District of Columbia." 39 Stat. 205.

[15] Act of June 19, 1935, 49 Stat. 391.

[16] See S. Rep. No. 635, 74th Cong., 1st Sess., pp. 2-3, quoted *infra*, p. 51.

to satisfy training and promotion standards. Their appointment by state authorities and the immediate control exercised over them by the States make it apparent that military members of the Guard are employees of the States, and so the courts of appeals have uniformly held. See n. 5, *supra*. Civilian caretakers should not be considered as occupying a different status. Caretakers, like military members of the Guard, are also paid with federal funds and must observe federal requirements in order to maintain their positions.[17] Although they are employed to maintain federal property, it is property for which the States are responsible, and its maintenance is for the purpose of keeping the state militia in a ready status. The National Defense Act of 1916 authorized the allocation of federal property to the National Guard, but provided

> "That as a condition precedent to the issue of any property as provided for by this Act, the State, Territory, or the District of Columbia desiring such issue shall make adequate provision, to the satisfaction of the Secretary of War, for the protection and care of such property . . . ."[18]

The Act also provided that damage or loss of federal property would be charged to the States, unless the Secretary of War determined that the damage or loss was unavoidable.[19] Caretakers appointed under §90 of the Act were thus to perform a state function, the maintenance of federal equipment allocated

[17] Detailed requirements for civilian caretakers are set out in Air National Guard Regulation No. 40-01, dated December 20, 1954 (hereinafter ANGR 40-01), and Air National Guard Manual No. 40-01, dated March 1, 1958.

[18] National Defense Act, § 83, 39 Stat. 203, 204, now 32 U.S.C. § 702(d) (1958 ed.).

[19] *Id.*, § 87, now 32 U.S.C. § 710 (1958 ed.).

to the Guard.[20] The caretakers have been termed the "backbone" of the Guard,[21] and are the only personnel on duty with Guard units during the greater part of the year. Like their military counterpart, caretakers are appointed by the State Adjutant General,[22] and are responsible to him in the performance of their daily duties. They can be discharged and promoted only by him.[23] Civilian caretakers are treated as state employees for purposes of the Social Security Act[24] for state retirement funds,[25] and under the regulations issued by the Department of the Air Force.[26] As early as 1920 the Comptroller of the Treasury ruled that a civilian caretaker was not a federal employee entitled to the annual leave provisions applicable to the War Department,[27] an opinion that was reiterated in 1941 by the Comptroller General[28] and that reflects the consistent position of the Department of Defense.[29]

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[20] In 1926 Congress authorized the employment of National Guard officers as caretakers, limited to one per squadron, in order to provide "an officer constantly on duty at the flying field for the supervision of flying training." H.R. Rep. No. 1031, 69th Cong., 1st Sess., p. 3, explaining the amendment to § 90 of the National Defense Act, enacted as Act of May 28, 1926, 44 Stat. 673, now 32 U.S.C. § 709(d) (1958 ed.). See also S. Rep. No. 785, 69th Cong., 1st Sess. Training, of course, was a duty reserved to the States by § 91 of the National Defense act and by Art. I, § 8, cl. 16, of the Constitution.

[21] Hearings before the Subcommittee of the House Appropriations Committee, 84th Cong., 2d Sess., p. 1303.

[22] ANGR 40-01, ¶¶3(b), 7(a).

[23] *Id.*, ¶3.

[24] Act of Aug. 14, 1935, c. 531, 49 Stat. 620, as amended, 42 U.S.C. § 418 (b)(5) (1958 ed.).

[25] Act of June 15, 1956, c. 390, 70 Stat. 283, as amended, 5 U.S.C. § 84d (1964 ed.).

[26] ANGR 40-01, ¶ 4, provides:
"Air National Guard civilian personnel are considered to be employees of the State, Territory, Puerto Rico, or the District of Columbia (21 Comp Gen Dec. 305)."

[27] 27 Comp. Dec. 344 (1920).

[28] 21 Comp. Gen. 305 (1941).

[29] See S. Rep. No. 1502, 86th Cong., 2d Sess., p. 6; H. R. Rep. No. 1928, 86th Cong., 2d Sess., p. 6.

United States v. *Holly*, *supra*, decided in 1951, held that civilian caretakers were employees of the United States, and has since been followed in other courts of appeals (n. 4, *supra*). *Holly* rested on a construction of the National Defense Act which, in our view, is not supported by the legislative history. Although the original section provided that caretakers were to "be detailed by the battery or troop commander" (who was a state employee), n. 14, *supra*, in 1935 Congress amended the statute to provide that the Secretary of the military establishment concerned (here the Secretary of the Air Force) "shall *designate* the person to employ" the caretaker.[30] The court in *Holly* read this amendment to mean that caretakers could be employed directly by federal authorities or by the State Adjutant General acting as a federal agent. However, the purpose of the amendment was simply to permit a State to pool its caretakers, and not to restrict the employment of such personnel only to those on the military roster of the unit where the equipment was allotted. The Senate report indicates that Congress envisaged that caretakers would continue to be employed only by the state authorities. It stated:

> "Section 6 of S. 2710 will authorize the pooling of National Guard caretakers. Under present law States are required to select the caretakers from the units that have the material. Section 6 will permit the handling under the adjutant general or other proper State official of the caretakers as a pool."[31]

It seems clear, then, that no significant distinction was intended between the method of employing military and civilian personnel of the National Guard.

Congress again in 1954 accepted the Defense Department understanding that civilian caretakers were employees of the States. In amending the Social Security Act (68 Stat. 1059, 42

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[30] *Supra*, n. 15, now 32 U. S. C. § 709 (f) (1958 ed.) (emphasis supplied).

[31] S. Rep. No. 635, 74th Cong., 1st Sess., pp. 2-3.

U. S. C. § 418(b)(5) (1958 ed.)) to provide coverage for civilian caretakers as state employees, the committee reports stated:

> "This provision would establish as a separate coverage group civilian employees of State National Guard units who are employed purusant to section 90 of the National Defense Act . . . and paid from funds allotted to such units by the Department of Defense. These employees would also be deemed to be employees of the State. The Department of Defense does not regard these employees as Federal employees . . . ."[32]

In 1956 Congress authorized federal disbursing officers to withhold from the salaries of civilian caretakers amounts needed by the States for their retirement systems. Although Congress was aware of the *Holly* line of cases,[33] the Senate report stated that authority was necessary since "[t]hese employees, although paid from Federal funds, are considered to be State rather than Federal employees. Accordingly, State authorities have been unable to make the usual deduction of the employee's contribution into the retirement system." S.Rep.No.2045, 84th Cong., 2d Sess. (1956).

In 1960 it was proposed to extend the coverage of the Federal Tort Claims Act to include civilian and military personnel of the National Guard.[34] This proposal was rejected, and the bill that finally passed provides an administrative procedure whereby the proper Secretary can pay claims up to $5,000 for damage to persons or property caused by National Guard personnel.[35] The Act includes liability for personal injury

[32] S. Rep. No. 1987, 83d Cong., 2d Sess., pp. 45-46; H. R. Rep. No. 1698, 83d Cong., 2d Sess., p. 50.

[33] S. Rep. No. 2045, 84th Cong., 2d Sess., p. 4.

[34] S. 1764 and H. R. 5435, 86th Cong., 2d Sess.

[35] Act of September 13, 1960, 74 Stat. 878, 32 U. S. C. § 715 (1958 ed., Supp. IV). If the claim is for more than $5,000 and the Secretary deems it meritorious he may award up to $5,000 and certify the balance to Congress for appropriate action.

caused by civilian caretakers, even though the Justice Department called to the attention of Congress the line of cases indicating that acts of civilian caretakers were already covered under the Federal Tort Claims Act.[36] The committee reports of both the House and Senate reflect acceptance of the position advocated by the Department of the Army that civilian caretakers should be included in the bill along with their military counterparts.[37]

In sum, we conclude that the congressional purpose in authorizing the employment by state authorities of civilian caretakers, the administrative practice of the Defense Department in treating caretakers as state employees, the consistent congressional recognition of that status, and the like supervision exercised by the States over both military and civilian personnel of the National Guard, unmistakably lead in combination to the view that civilian as well as military personnel of the Guard are to be treated for the purposes of the Tort Claims Act as employees ot the States and not of the Federal Government. This requires a decision that the United States is not liable to petitioners for the negligent conduct of McCoy.[38]

[36] See S. Rep. No. 1502, 86th Cong., 2d Sess., p. 11; Hearings before Subcommittee No. 2 of the House Committee on the Judiciary on H. R. 5435 and H. R. 9315, 86th Cong., 2d Sess., pp. 6-7.

[37] See S. Rep. No. 1502, *supra;* H. R. Rep. No. 1928, *supra.* The 1960 Act does not cover the accident involved in these cases, since the collision occurred in 1958.

[38] Petitioners contend that the judgments of the District of Columbia Circuit in *Meyer* should be given collateral estoppel effect here, even though petitioners were not parties in *Meyer.* See Restatement, Judgments § 93, comment *b;* Developments in the Law—*Res Judicata,* 65 Harv. L. Rev. 818, 865, 870-871 (1952); but see *United States* v. *United Air Lines, Inc.,* 216 F. Supp. 709, aff'd on other grounds *sub nom. United Air Lines, Inc.* v. *Wiener,* 335 F. 2d 379, writ of cert. dismissed under Rule 60, 379 U. S. 951. We reject the Government's contention that the point was not preserved below. Having regard to the fact that the decisison in *Meyer* came down during the interval between the argument and decision of *Levin,* we think that the estoppel challenge was properly and timely raised in the petition for rehearing in *Levin.* However, we need not reach the merits of the challenge since the judgment in *Meyer,* also pending in this Court (see p. 43, *supra*), must, in any event, now fall in consequence of our decision in the cases before us.

In so holding we are not unmindful that this doubtless leaves those who suffered from this accident without effective legal redress for their losses.[39] It is nevertheless our duty to take the law as we find it, remitting those aggrieved to whatever requitement may be deemed appropriate by Congress, which in affording the administrative remedies, unfortunately not available here (see n. 37), has shown itself not impervious to the moral demands of such distressing situations.

Affirmed.

MR. JUSTICE DOUGLAS dissents.

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[39] The State of Maryland has not, so far as we know, waived its sovereign immunity, and petitioners are not eligible for benefits under 32 U. S. C. § 715, *supra*, n. 35.

JILL MARY KOHR, EXECUTRIX OF THE ESTATE OF ROBERT H. KOHR, DECEASED, PLAINTIFF-APPELLEE,

v.

ALLEGHENY AIRLINES, INC., AND UNITED STATES OF AMERICA, DEFENDANTS-APPELLANTS,

v.

FORTH CORPORATION ET AL., THIRD-PARTY DEFENDANTS-APPELLEES.

Nos. 73-1392, 73-1393.

United States Court of Appeals.
Seventh Circuit.

Argued Feb. 14, 1974.

Decided Sept. 20, 1974.

Rehearing and Rehearing En Banc
Denied Nov. 26, 1974.

SWYGERT, Chief Judge.

Defendants-appellants Allegheny Airlines, Inc. and the United States, appeal from the dismissal of their cross-claims and third-party complaints for indemnity and contribution against defendants-appellees Brookside Corporation (Brookside), Forth Corporation (Forth is a wholly-owned subsidiary of Brookside), and the estate of Robert W. Carey. The instant actions arise out of a mid-air collision on September 9, 1969, in the airspace over Fairland, Indiana between an Allegheny Airlines DC-9-31 jet aircraft and a Piper Cherokee aircraft piloted by Robert W. Carey and owned by Forth. The events surrounding the collision are set out in detail in the companion

case to this action. Allegheny Airlines, Inc. and GECC Leasing Corp. v. United States of America, et al., 504 F.2d 104 (7th Cir. 1974), and need only be briefly recounted here.

The Allegheny aircraft was operated as Flight No. 853 en route from Cincinnati, Ohio to Indianapolis, Indiana. At the time of the collision Flight No. 853 was flying under an instrument flight rules clearance from Cincinnati to Indianapolis and was receiving and adhering to air traffic control radar directions from an air traffic controller employed by the Federal Aviation Administration at the Indianapolis Approach Control facility located at Indianapolis' Weir Cook Airport. The Piper Cherokee aircraft was operated by Carey, a student pilot, under visual flight rules. At the time of the collision Carey was engaged in a solo cross-country flight from Brookside Airport, McCordsville, Indiana to Bakalar Air Force Base, Columbus, Indiana. As a result of the mid-air collision both aircraft were totally destroyed and all eighty-three occupants were killed.

Subsequent to the accident, wrongful death actions were commenced on behalf of the estates of all the deceased passengers save one, the estates of three of the four Allegheny crew members, and the estate of Robert W. Carey. In addition, property damages suits were initiated to recover for the destruction of the two aircraft. All of these suits were commenced in various federal district courts on the basis of diversity of citizenship as to defendants Allegheny, Brookside, Forth, and the estate of Carey, and the Federal Tort Claims Act as to the defendant United States. The Judicial Panel on Multidistrict Litigation assumed jurisdiction over the various actions commenced outside of Indiana and pursuant to 28 U.S.C. §1407 transferred them to the United States District Court for the Southern District of Indiana for the purpose of supervision of the pretrial discovery. In re Mid-Air Collision Near Fairland, Indiana, 309 F.Supp. 621 (Jud.Pan.Mult.Lit.1970). Subsequent to the section 1407 transfer, the district court judge issued orders pursuant to 28 U.S.C. §1404 transferring cases from

respective transferor forums to the United States District Court for the Southern District of Indiana and consolidated those cases with other companion cases that had been initially commenced in the Indiana district court. By the time of trial Allegheny and the United States had filed cross-claims and third-party complaints against Brookside, Forth, and the estate of Carey seeking indemnity and contribution.

The first group of passenger cases was assigned to trial on February 22, 1972. The district judge severed all cross-claims and third-party complaints between the parties and deferred resolution of those issues until a future date. After the commencement of the February trial which involved as defendants Allegheny, the United States, Brookside, Forth, and the estate of Carey, an agreement was arrived at between the United States and the liability insurers of Allegheny for a pro-rata formula to be utilized between them in disposing of all cases, whether by settlement or judgment. The defendants Forth, Brookside, and estate of Carey were not parties to, and did not contribute anything to or under the agreement. Thereafter, on motion of plaintiffs and defendants Allegheny and the United States, the first group of passenger cases on trial were terminated and all claims, cross-claims, and third-party complaints were dismissed without prejudice pending a hearing on the reasonableness of the compromise. The district court found the compromise to be reasonable and accordingly Allegheny's insurers and the United States proceeded to settle the remaining passenger cases.

On December 5, 1972 the district court entered an order dismissing all actions including the plaintiffs' complaints as well as defendants' cross-claims, third-party complaints, and counterclaims. All such claims were to be dismissed with prejudice as of January 5, 1973. Both Allegheny and the United States moved to vacate the December 5 entry objecting to the dismissal with prejudice of their claims over for indemnity and contribution against Forth, Brookside, and the estate of Carey. At a hearing on January 5, 1973 the district

judge vacated its prior order of December 5, 1972 and directed that the plaintiffs' actions were to be dismissed without prejudice. At the same time the district judge allowed defendants Forth, Brookside, and the estate of Carey to file additional paragraphs of their answer pleading the defenses of res judicata, collateral estoppel, voluntary payment, accord and satisfaction, and failure to state a claim for relief in that no right to indemnity and contribution existed under Indiana law.

Thereafter, the court proceeded to grant the motions of Forth, Brookside, and the estate of Carey to dismiss the claims by Allegheny and the United States for indemnity and contribution by virtue of the application of Indiana law. In addition, the court granted summary judgment to Brookside, Forth, and the estate of Carey on the basis of the affirmative defenses of voluntary payment and accord and satisfaction in that the memorandum of agreement between Allegheny's liability insurers and the United States and the settlement of actions pursuant thereto constituted voluntary payments and accords and satisfactions. The court also granted summary judgment to Brookside on the separate defenses of res judicata and collateral estoppel as a result of the judgment entered in Allegheny Airlines, Inc. and GECC Leasing Corp. v. United States of America, et al., in which it had been previously held that Brookside Corporation was not responsible for the torts committed by its wholly-owned subsidiary Forth Corporation.

I

Allegheny and the United States raise various issues in an appeal, to which we address the following: (1) whether the district court erred in dismissing the cross-claims and third-party complaints for indemnity and contribution for failure to state claims upon which relief may be granted; (2) whether the district court correctly granted summary judgment to Brookside on the basis of res judicata and collateral estoppel; (3) whether the district court properly entered summary judgment on the

basis that settlement of plaintiffs' claims by Allegheny and the United States constituted voluntary payment which barred any claims by Allegheny and the United States against the defendants; (4) whether the district court erred in granting summary judgment to Forth, Brookside, and the estate of Carey on the ground that the agreement between Allegheny's liability insurers and the United States constituted an accord and satisfaction thereby barring any claim for indemnity and contribution; and (5) whether the district court erred in entering an order dismissing all plaintiffs' claims without prejudice.

In view of our decision in the companion case of Allegheny Airlines, Inc. and GECC Leasing Corp. v. United States of America, et al., 504 F.2d 104 (7th Cir. 1974), Allegheny and the United States are precluded on the basis of the doctrines of res judicata and collateral estoppel from further pursuit of their claims for contribution and indemnity from the defendant Brookside. Accordingly, we affirm the district court on that issue. With respect to the remaining issues, however, we reverse and remand to the district court for trial.

II

Allegheny contends that it was error for the district court to dismiss its cross-claims and third-party complaints for indemnity and contribution. The district court held that Indiana law was controlling on these claims and that under Indiana law there could be no contribution and indemnity under that state's law. Allegheny urges that a federal rule of contribution and indemnity should govern in the instant action. Failing the application of a federal law of contribution Allegheny contends that in view of the multiplicity of state jurisdictions involved, with the various plaintiffs instituting actions in numerous states other than Indiana, the trial judge should have conducted an evidentiary hearing to facilitate a proper choice of law analysis. Had the district judge done so, it is claimed that jurisdictions other than Indiana would be found to have a more substantial

interest in having their laws on contribution and indemnity applied. In addition, Allegheny contends that even assuming Indiana law controls, the district court misapplied the rules on contribution and indemnity.

Were it necessary, we would be inclined to agree with Allegheny that the district judge failed to engage in an adequate conflict of law analysis and that he erred on the application of Indiana law on contribution and indemnity. We need not reach these issues, however, for we agree with Allegheny that there should be a federal law of contribution and indemnity governing mid-air collisions such as the one here.

III

The basis for imposing a federal law of contribution and indemnity is what we perceive to be the predominant, indeed almost exclusive, interest of the federal government in regulating the affairs of the nation's airways. Moreover, the imposition of a federal rule of contribution and indemnity serves a second purpose of eliminating inconsistency of result in similar collision occurrences as well as within the same occurrence due to the application of differing state laws on contribution and indemnity. Given the prevailing federal interest in uniform air law regulation, we deem it desirable that a federal rule of contribution and indemnity be applied.

That the federal interest in regulating airways is predominant was long ago recognized by Justice Jackson in Northwest Airlines v. Minnesota, 322 U.S. 292, 303, 64 S.Ct. 950, 956, 88 L.Ed. 1283 (1944):

> Students of our legal evolution know how this Court interpreted the commerce clause of the Constitution to lift navigable waters of the United States out of local controls and into the domain of federal control. Gibbons v. Ogden, 9 Wheat. 1, 6 L.Ed. 23,

> to United States v. Appalachian Power Co., 311 U.S. 377 [61 S.Ct. 291, 85 L.Ed. 243]. Air as an element in which to navigate is even more inevitably federalized by the commerce clause than is navigable water. Local excactions and barriers to free transit in the air would neutralize its indifference to space and its conquest of time.
>
> Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls. It takes off only by instruction from the control tower, it travels on prescribed beams, it may be diverted from its intended landing, and it obeys signals and order. Its privileges, rights, and protection, so far as transit is concerned, it owes to the Federal Government alone and not to any state government.

With the passage of the Federal Aviation Act of 1958, 49 U.S.C. § 1301 et seq., Congress expressed the view that the control of aviation should rest exclusively in the hands of the federal government. In section 1108 of the Act, 49 U.S.C. § 1508(a), it is clearly provided that:

> (a) The United States of America is declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States, including the airspace above all inland waters and the airspace above those portions of the adjacent marginal high seas, bays, and lakes, over which by international law or treaty or convention the United States exercises national jurisdiction. Aircraft of the armed forces of any foreign nation shall not be

> navigated in the United States, including the Canal Zone, except in accordance with an authorization granted by the Secretary of State.

The explicit objective of the Act is to foster the development of air commerce. 49 U.S.C. § 1346. To that end, it has been recognized that the principal purpose of the Act is to create one unified system of flight rules and to centralize in the Administrator of the Federal Aviation Administration the power to promulgate rules for the safe and efficient use of the country's airspace. United States v. Christensen, 419 F.2d 1401 (9th Cir. 1969); Air Line Pilots Association v. Quesada, 276 F.2d 892 (2d Cir. 1960). When the notion of federal preemption over aviation is viewed in combination with the fact that this litigation ensues from a mid-air collision occurring in national airspace, that the Government is a party to the action pursuant to the Federal Tort Claims Act (28 U.S.C. § 1346(b) et seq.), and that this litigation has since its inception been subject to the supervision of the Judicial Panel created by the Multidistrict Litigation Act (28 U.S.C. § 1407 et seq.), there is no perceptible reason why federal law should not be applied to determine the rights and liabilities of the parties involved. The interest of the state wherein the fortuitous event of the collision occurred is slight as compared to the dominant federal interest. Accordingly, the rights and liabilities of Allegheny and the United States are peculiarly federal in nature and are to be governed by a federal rule of contribution and indemnity.[3]

IV

Having determined that a federal rule of contribution and indemnity among joint tort-feasors should control in aviation

[3] In view of the aforementioned predominant federal interest in formulating a rule of contribution and indemnity we are of the view that the Federal Tort Claims Act is not an obstacle to the application of such a rule to the United State's claims. In addition we find no merit in defendants' argument that Allegheny and the United States are estopped to assert the invalidity of the dismissal of their cross-claims and third-party complaints.

collisions, we reject as being outmoded and entirely unsatisfactory, the contention that the federal rule should be one of "no contribution." We agree that "[t]here is an obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were equally, unintentionally responsible, to be shouldered on to one alone, according to the accident of a successful levy of execution, the existence of liability insurance, the plaintiffs' whim or spite, or his collusion with the other wrongdoer, while the latter goes scot free." Prosser, Law of Torts, § 50 (4th ed. 1971).

In our judgment the better rule is that of contribution and indemnity on a comparative negligence basis. Under such an approach the trier of fact will determine on a percentage basis the degree of negligent involvement of each party in the collision. The loss will then be distributed in proportion to the allocable concurring fault. In allocating the loss where as here that amount involves a settlement and not a judgment, the trier of fact must also establish what amount would be a reasonable settlement under the circumstances. On reaching such an amount each party contributes according to his degree of fault.

Allegheny and the United States contend that the district court improperly entered summary judgment against them with respect to defenses raised by the defendants claiming voluntary payment, and accord and satisfaction. Also it is contended by Allegheny and the United States that the district court erred in entering an order dismissing all plaintiffs' claims without prejudice.

As to the defense of voluntary payment, the defendants urge that the settlement of plaintiffs' claims by Allegheny and the United States constituted a voluntary payment which barred any claims by them against the defendants. We disagree for it is a well recognized policy that settlements are to be encouraged, and we have previously held that a voluntary settlement does not bar a subsequent suit for indemnity. Chicago, Rock Island & Pacific Ry. Co. v. United States, 220 F.2d 939, 941 (7th Cir. 1955). Moreover, we note that in

applying the federal rule of contribution and indemnity the trier of fact is to make a determination as to what was a reasonable amount at which to settle. Such a determination would necessarily take into consideration the voluntary nature of the settlement.

We find to be without worth defendants' contention that the agreement between Allegheny's liability insurers and the United States constituted an accord and satisfaction thereby barring any claims for indemnity and contribution. There was no contract between Allegheny or the United States and the defendants. Moreover, it cannot be claimed that the defendants were the intended beneficiaries of any agreement between Allegheny and the United States.

Lastly, we agree with Allegheny and the United States that it was error for the district court to enter the order of January 5, 1973 dismissing all of the plaintiffs' complaints without prejudice, the exact opposite of what the parties had agreed to in settlement. Under the circumstances it was an abuse of discretion for the district court to effectively change the settlement from one providing for dismissal of plaintiffs' complaints with prejudice to one providing for the dismissal without prejudice.

Affirmed in part; reversed in part and remanded for a new trial pursuant to Circuit Rule 23.

GEORGE H. HUMPHREYS, ET AL. v. HERMAN TANN, ET AL.

United States District Court, Eastern District of Michigan, January 13, 1976.

KAESS, District Judge: This action arises out of a mid-air collision near Urbana, Ohio, on March 9, 1967, between a Trans World Airlines ("TWA") DC-9 aircraft and a Beech Baron aircraft owned by Defendant Tann Company. Plaintiff maintains suit seeking recovery for wrongful death as administrator of the estate of John S. Humphreys, a passenger aboard the TWA aircraft. The instant action was commenced in this District in February, 1969. In July, 1970, Defendant Tann answered plaintiff's complaint, and filed its own third-party complaint on TWA and the United States of America, seeking indemnity and/or contribution in the event of liability to the plaintiff. In October, 1970, the United States answered the third-party complaint of Tann, and also asserted a counterclaim for indemnity and/or contribution from Tann in the event the United States was held liable in a similar action filed by the plaintiff against the United States in the United States District Court for the Southern District of New York. The New York suit was subsequently settled on payment of $10,000 by the United States.

The entire matter was subsequently transferred by the Judicial Panel on Multidistrict Litigation ("JPML") to the United States District Court for the Southern District of Ohio, Western Division, for consolidated pre-trial proceedings pursuant to 28 U.S.C. § 1407. On January 8, 1975, the JPML ordered the action remanded to this Court. *In re Multidistrict Civil Actions Involving Air Crash Disaster Near Dayton, Ohio, on March 9, 1967*, 386 F.Supp. 908 (JPML 1975). At the time of remand, there were several pending motions which had been made to the Court in Ohio. As indicated by the JPML in its Order of Remand, these motions are appropriate for determination by this Court. The pending motions consist of the following:

1. Motion by TWA for Summary Judgment or for Dismissal of Tann's Third-Party Complaint;

2. Motion by Tann to Dismiss the Counterclaim of the United States;

3. Motions by Tann to Strike the Complaint of the Plaintiff;

4. Motion by Tann to Amend its Answer; and

5. Motion of Tann to Transfer.

Oral argument on each of the motions was heard by this Court on September 8, 1975.

Each of the first two motions noted above deals essentially with problems related to the issues of contribution and indemnity between the alleged joint tortfeasors. These problems are further compounded by the settlements previously entered into between TWA, the United States, and the plaintiff. As a basis for its motion for summary judgment or dismissal of Tann's third-party complaint, TWA relies on Ohio law to the effect that there is no right to contribution between joint tortfeasors. 11 O.Jur.2d, Contribution §20. TWA further asserts that in order for the plaintiff to recover from Defendant Tann, it must prove a case of active negligence, thereby barring the possibility of indemnity. 11 O.Jur.2d, Contribution § 21; *The Globe Indemnity Co.* v. *Schmitt*, 142 O.S. 595 (1944). Defendant Tann has also moved to dismiss the counterclaim of the United States, for contribution or indemnity, on the grounds that the counterclaim was unmatured at the time of filing, contrary to Rule 13(a) of the Federal Rules of Civil Procedure. Tann further asserts that the subsequent settlement by the United States assures that the claim will never mature as a determination of liability, and that therefore it should be barred by F.R.C.P. 13(a).

[*Apportionment of joint tortfeasors' liability*]

With respect to the motion by TWA, there is apparent conflict over which forum, as between Michigan and Ohio, should supply the appropriate law on contribution and indemnity.[1] A typical approach would require a review of the doctrines of conflict of laws, and the selection and application of the proper law. However, this Court is of the opinion that in a mid-air collision case such as this, neither the law of Michigan nor the law of Ohio is controlling. Rather, a federal standard of apportionment of liability between joint tortfeasors should be applied.

This approach was first enunciated in *Kohr v. Allegheny Airlines, Inc.* [13 Avi.17,297], 504 F.2d 400 (7th Cir.), cert. denied 421 U.S. 978 (1975). Specifically, the court held that "there should be a federal law of contribution and indemnity governing mid-air collisions." *Kohr, supra,* at 403. In support of this proposition, the court pointed to the existence of an extensive federal interest in national air traffic.

"The basis for imposing a federal law of contribution and indemnity is what we perceive to be the predominant, indeed almost exclusive, interest of the federal government in regulating the affairs of the nation's airways. Moreover, the imposition of a federal rule of contribution and indemnity serves a second purpose of eliminating inconsistency of result in similar collision occurrences as well as within the same occurrence due to the application of differing state laws on contribution and indemnity. Given the prevailing federal interest in uniform air law regulation, we deem it desirable that a federal rule of contribution and indemnity be applied." *Kohr, supra, at 403.*

This interest is perhaps best exemplified by the declaration contained in the Federal Aviation Act of 1958, 49 U.S.C. § 1301, *et. seq.* Section 1108 of that Act, 49 U.S.C. § 1508(a), provides

[1] Unlike Ohio, Michigan does have a statute permitting contribution between joint tortfeasors. M.C.L.A. § 600.2925.

"The United States of America is declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States, including the airspace above all inland waters and the airspace above those portions of the adjacent marginal high seas, bays, and lakes, over which by international law or treaty or convention the United States exercises national jurisdiction. Aircraft of the armed forces of any foreign nation shall not be navigated in the United States, including the Canal Zone, except in accordance with an authorization granted by the Secretary of State."

As further factors to be considered, the *Kohr* court noted that the Government was made a party under the Federal Tort Claims Act, 28 U.S.C. § 1346(b), *et seq.*, and that the action had previously been under the supervison of the JPML since its inception.

In the case at bar, only the defendant Tann is located within this District. None of the parties is situated in Ohio. The only relation of Ohio to this litigation is the coincidence that the colliding aircraft happened to fall there after the collision. Certainly, considering the predominant federal interest to be preserved in air navigation and the minimal state nexus demonstrated in this area, the balance weighs heavily in favor of a uniformity of policy. Such a uniformity is impossible under a system which depends on the vagaries of state policies and statutes in actions of this type. See, 28 Vand. L. Rev. 621, 625-627(1975).

Concluding that a uniform federal rule of contribution and indemnity in mid-air collision cases is preferred, the Court adopts the comparative negligence approach described in *Kohr*. There the court noted

"In our judgment the better rule is that of contribution and indemnity on a comparative negligence basis. Under such an approach the trier of fact will determine on a percentage basis

the degree of negligent involvement of each party in the collision. The loss will then be distributed in proportion to the allocable concurring fault. In allocating the loss where as here that amount involves a settlement and not a judgment, the trier of fact must also establish what amount would be a reasonable settlement under the circumstances. On reaching such an amount each party contributes according to his degree of fault."

Kohr, supra, at 405. This basis of joint tortfeasor liability finds somewhat analogous support in the recent decision of the United States Supreme Court in *U.S. v. Reliable Transfer Co.,* 421 U.S. 397 (1975). In *Reliable,* the Court undertook a review of the admiralty rule of divided damages, whereby the property damage in a maritime collision is equally divided whenever two or more parties involved are found to be guilty of contributory fault, regardless of the degree of fault. *The Schooner Catherine v. Dickinson,* 17 How. 170. In rejecting this rule, the Court held

"It is no longer apparent, if it ever was, that this Solomonic division of damages serves to achieve even rough justice. (Footnote omitted.) An equal division of damages is a reasonably satisfactory result only where each vessel's fault is approximately equal and each vessel thus assumes a share of the collision damages in proportion to its share of the claim, or where proportionate degrees of fault cannot be measured and determined on a rational basis. The rule produces palpably unfair results in every other case. For example, where one ship's fault in causing a collision is relatively slight and her damages small, and where the second ship is grossly negligent and suffers extensive damage, the first ship must still make a substantial payment to the second. 'This result hardly commends itself to the sense of justice any more appealingly than does the common law doctrine of contributory negligence . . .' Gilmore & Black 528."

Reliable, supra, at 405. In substitution, the Court adopted a rule of comparative negligence where an allocation of disproportional fault coult be made.[2]

The Court, of course, recognizes the inherent distinction between maritime and aviation law in that federal maritime law is supported by a constitutional grant of federal jurisdiction. U.S. Const., Art. III, § 2. However, this distinction ignores the postconstitutional development of our Nation's airways and the notable parallels between the developments of the two modes of travel and transport. And, as indicated previously, exclusive jurisdiction over the national airspace is vested in the United States. Under these circumstances, it seems only appropriate that the procedural aspects of actions arising out of this area bear some semblance of consistency. The motion of TWA to dismiss the third-party complaint of Tann for contribution and/or indemnity must, therefore, be denied.

With respect to the motion of Tann to dismiss the counterclaim of the United States for contribution and/or indemnity, it must be noted that the Federal Rules of Civil Procedure make provision for counterclaims which subsequently mature. Rule 13(e) provides

"A claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counter claim by supplemental pleading."

As indicated previously, after the filing of the counterclaim by the United States in this action, an independent action between the plaintiff here and the Untied States, and involving the same air disaster, was settled for the sum of $10,000.00. There is no indication that Tann either took part in the settlement negotiations or that a tender of defense was made.

[2] See also, *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, 409; Merchant Marine Act, 38 Stat. 1185, as amended, 41 Stat. 10007, 46 U.S.C. § 688; Death on the High Seas Act, 41 Stat. 537, 46 U.S.C. § 766.

In view of the previous discussion with respect to the liabilities of alleged joint tortfeasors in actions of this type, the Court deems it appropriate that the counterclaim be permitted. Under the liberal federal rules of pleading, the counterclaim does state a claim upon which relief could be granted.[3] Under these circumstances, the motion of Tann to dismiss must be denied.

Motion to Strike Complaint

Defendant Tann maintains two independent motions, the purpose of which is to have the complaint of the plaintiff struck. The first is a motion dated April 24, 1972, wherein the defendant moved to strike the complaint for the failure of the plaintiff to either answer or object to interrogatories filed October 23, 1970. The second motion, of September 11, 1974, seeks the same relief, reiterates the initial basis, and also asserts the grounds that the plaintiff failed to produce certain documents described in a notice to produce filed June 24, 1974.

In response, plaintiff contends that the answers to 80 of the 102 interrogatories were served January 21, 1971, and that the remaining 22 were answered September 19, 1974. While Defendant Tann disputes that the original answers were served as alleged, it is apparent that the answers of the plaintiff have now been supplied. With respect to the notice to produce certain documents, plaintiff contends that the documents are irrelevant as they relate to proofs of damages and, in any event, that the plaintiff will request that this be a bifurcated trial, the issue of liability being first determined. Notwithstanding the above, it does not appear that the plaintiff either produced or objected to the production of the documents prior to response to defendant's motion to strike. *Note*, Rule XIV of the Rules of

[3] See, *Tankrederiet Gefion A/S* v. *Hyman-Michaels Company*, 406 F.2d 1039 (6th Cir. 1969), on the burden imposed upon a settling party seeking indemnity and/or contribution, where there has been no tender of defense.

the United States District Court for the Eastern District of Michigan. Conversely, the Court is not aware of a prior motion to compel the answers to interrogatories or the production of documents brought on behalf of the defendant pursuant to Rule 37(a)(2) of the Federal Rules of Civil Procedure.

A review of the interrogatories, and the responses which were ultimately supplied, satisfies the Court that, in general, the defendant has received much of the information sought.[4] Should the defendant require additional information, the Court suggests that further supplemental interrogatories be submitted to the plaintiff.

With respect to the production of certain documents requested by the defendant, it is apparent that counsel for the plaintiff displays an utter disregard for the rules governing discovery in civil litigation. Not only were the documents not produced, or their production objected to as required, but counsel would also take upon himself the responsibility of determining both the relevance of such information and the future course of this litigation. Such unilateral action cannot and will not be tolerated by the Court.

The Court recognizes that it has the authority to dismiss the action of the plaintiff under Rule 37(d) of the Federal Rules of Civil Procedure. However, such a remedy would be extremely harsh, even considering the factors set forth above. Therefore, it is the order of this Court that the plaintiff supply the documents described in the notice to produce for inspection by the defendant within thirty days of the date of the entry of this Order. Further, the plaintiff shall bear the reasonable expenses, including attorney's fees, which were made necessary by the bringing of the motions to strike.

[4] The Court notes, for example, that in interrogatory #79 defendant seeks information relating to possible releases or covenants not to sue entered into with other parties. While no answer is given, two settlements entered into by the plaintiff are the subject of a motion to amend brought by the Defendant Tann.

Motion to Amend Answer

Defendent Tann, pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, seeks by motion to amend its answer to include two affirmative defenses. The first of these relates to a settlement entered into between the plaintiff and third-party defendant TWA, and the second to a settlement between the plaintiff and third-party defendant United States of America. Tann contends that these settlements are affirmative defenses, pursuant to Federal Rule of Civil Procedure 8(c), in that they tend to exonerate or mitigate Tann's liability, and that therefore they should be permitted by the Court. The plaintiff contends that the defenses are immaterial, asserted for prejudice, and that they may only be used after trial to deduct from any ultimate money verdict.

Rule 15(a) of the Federal Rules of Civil Procedure provides in part

"Otherwise a party may amend his pleadings only by leave of Court or by written consent of the adverse party; *and leave shall be freely given when justice so requires.*" (Italics added).

Rule 8(c) provides

"In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, *res judicata*, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense."

Admittedly, this motion is somewhat belatedly brought in that the original action was commenced nearly seven years ago. However, intervening factors, including extended discovery in Ohio and appeal processes through the Court of Appeals must also be considered in weighing the delay.

A review of the proposed amendments satisfies the Court that they may appropriately be brought as affirmative defenses to the action of the plaintiff against the defendant. Mitigation of damages and the possibility of a complete release by a Covenant not to sue are issues which should be presented to the jury in a trial of this matter so as to place before them a total and accurate presentation of the facts as they currently exist. See, *Ford Motor Co. v. Tomlinson*, 229 F.2d 873, 878 (6th Cir. 1956); *Larabell v. Schuknecht*, 308 Mich. 419, 424-425 (1944); *Steele v. Wilson*, 29 Mich.App. 388, 398 (1971); 66 Am.Jur.2d, Release, § 41.

For these reasons, the motion of Defendant Tann to amend its response is granted.

Motion to Transfer

Defendant Tann has moved, pursuant to §1404(a), Title 28, U.S.C., for an Order transferring this action from the United States District Court for the Eastern District of Michigan to the United States District Court for the Southern District of Ohio, Western Division. Defendant Tann asserts that such a transfer would best serve the convenience of the parties and witnesses and the interest of justice. In support of this contention, the defendant lists the names and addresses of several potential witnesses who reside in the vicinity of the Ohio court, and would therefore be subject to subpoena and able to testify live in any trial of this matter.

Plaintiff, in opposition to this motion, argues that there are several witnesses who do not reside in the area of the court in Ohio, who he intends to call as witnesses. Further, plaintiff contends that an identical motion was argued before the JPML prior to its Order of Remand to this Court, and that the Order is *res adjudicata* as to the present motion. Plaintiff also contends that a transfer to Ohio would be prejudicial in that the District Court in Ohio has previously expressed an unfavorable attitude toward the plaintiff.

In determining whether or not to transfer an action such as this, there are several factors to be considered. These include:

1. The convenience of witnesses;

2. The compulsory attendance of witnesses;

3. Ease of access to sources of proofs; and

4. Residence of the plaintiff.

Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947); *U.S. Industries, Inc. v. Proctor & Gamble Co.*, 348 F.Supp. 1265 (D.C.N.Y. 1972); *White v. Lykes Bros. S.S. Co.*, 333 F.Supp. 836 (D.C.Pa. 1971); *Hyde Construction Co. v. Koehring Co.*, 321 F.Supp. 1193 (D.C.Miss. 1969).

Needless to say, plaintiff's choice of forum bears considerable weight in this respect and should not be altered absent a strong showing on the part of the moving party. *Holiday Rambler Corp. v. American Motors Corp.*, 254 F.Supp. 137 (D.C.Mich. 1966); *Shutte v. Armco Steel Corp.*, 431 F.2d 22, 25 (3rd Cir. 1970), cert. denied 401 U.S. 910, 91 S.Ct. 871.

Based on a review of the materials submitted in this matter, it would appear that any forum will be inconvenient for some of the witnesses should this matter come to trial. Some witnesses are convenient to the Ohio District Court, while others are located near this Court. Others still are located outside either jurisdiction. This conflict would not be resolved by any transfer of this action.

Therefore, Defendant Tann's motion to transfer must be denied.

It Is So Ordered.

INTERAGENCY TASK FORCE OR PRODUCT LIABILITY:LEGAL STUDY

Report No. ITFPL-77

National Technical Information Service (1978)

INDEMNITY AND CONTRIBUTION

I.

Introduction

The only legal theories a manufacturer has available to shift all, or part, of its liability onto an employer are "indemnity" and "contribution." However, the courts have allowed manufacturers' claims in only a few instances, in part because the employer's immunity from suit precludes it from being considered a joint tortfeasor. One remedy to this problem is, by statutory amendment, to allow the manfacturer to shift at least part of its liability to the negligent employer, apportioning damages according to relative fault.

II.

Assessment

Although there have been complex modifications in the contribution and indemnity rules in Pennsylvania and California, and although there are pending bills in Congress for altering the rules of contribution, the best remedy appears to be the law developed in New York. Despite the requirement of two judicial determinations, the New York rule is simpler and allows manufacturers to recover from employers that proportion of the damages that the employer partially caused. Absent any other change in the law, a similar legislatively sanctioned contribution rule is recommended.*

III.

Models

A.

The Pennsylvania Rule on Compensation

Pennsylvania has forged a pragmatic compromise by allowing third-party actions against the employer for contribution, but only up to the amount of the employer's workers' compensation liability. Thus, the employer does not pay more as a joint tortfeasor than he would if he were solely liable. California in a more direct way holds the negligent employer liable for a portion of the loss, but in products liability cases the manufacturer is to bear the full loss from injuries attributable to defective products, and the employer's negligence cannot be raised as a partial defense. A combination of the Pennsylvania and the California law might provide a worthy model if it shifted enough of the loss from the manufacturer to the employer.

B.

Federal Legislation—94th Congress

1. *The Industrial Safety Encouragement Act* (S. 3317 and H.R. 13624)

The "Taft bill" states that, when an employer fails to comply with OSHA's standards for health and safety, and when this failure "caused or contributed to" the injury of an employee, the employer will no longer be shielded from an action of contribution or indemnification, brought by a third party who suffered economic injury as a result of the employer's misconduct. The bill leaves open the possibility of a great deal of diversity among the various states and would not standardize the law on contribution and indemnity. Furthermore, OSHA standards tend to lag behind fast-paced technological change, so that the bill would not be technically effective.

2. *Amendments to S. 2018*

The Taft bill amendments would be a compromise which allow a third party to seek contribution or indemnity from the employer, but limit that recovery to the level of the employer's workers' compensation liability. While maintaining an absolute limit on an employer's liability, it would provide manfacturers with some relief.

C.

The Dole Rule in New York

In *Dole v. Dow Chemical Co.*, the court of appeals ruled that the manfacturer could recover damages from the employer in an action to determine apportionment of responsibility for negligence. The *Dole* rule has since been given legislative approval so that settlements will presumably be encouraged. It is by far the simplest of the models, although there is no evidence for success or failure of this approach.

D.

Equitable Credit

Under equitable credit, the manufacturer pays damages according to his degree of negligence and the employer pays only up to his liability as set by the applicable compensation scheme. Any additional loss of the worker goes uncompensated.